Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOLLINGSWORTH & VOSE COMPANY,

Petitioner,

v.

MILTON HOROWITZ AND SHIRLEY HOROWITZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA.

PETITION FOR A WRIT OF CERTIORARI.

ANDREW J. MCELANEY, JR.
Counsel of Record
STEPHEN J. BRAKE
DANIEL P. OLOHAN
NUTTER, MCCLENNEN & FISH, LLP
One International Place
Boston, MA 02110-2699
(617) 439-2000

DONALD F. ZIMMER, JR.
PREUSS WALKER & SHANAGHER, LLP
595 Market Street, 16th Floor
San Francisco, CA 94105-2825
(415) 978-2600

Counsel for Petitioner
Hollingsworth & Vose Company

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

140 pp

QUESTIONS PRESENTED

I. Whether the California Court of Appeal's holding that a trial judge may properly submit an unpled and untried fraud claim to the jury violates this Court's precedents establishing a defendant's due process right to notice and an opportunity to be heard on all claims brought against it.

II. Whether a state appellate court may, within the confines of due process, dispense with a long-standing rule of state civil procedure upon which a party has justifiably relied so as to uphold the trial court's decision depriving that party of notice of a claim asserted against it.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Plaintiffs are Milton Horowitz and Shirley Horowitz. Defendants are Hollingsworth & Vose Company and Lorillard, Inc. Hollingsworth & Vose Company does not have a parent corporation. Hollingsworth & Vose Company's non-wholly owned subsidiaries and affiliates are Neponset River Company and Hovomex, S.A.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI.

Hollingsworth & Vose respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California.

OPINION BELOW

The Opinion of the Court of Appeal of California (App., *infra*, 1a-32a) is not reported.

JURISDICTION

The judgment of the Court of Appeal of California was entered on August 12, 1997. The Supreme Court of California denied discretionary review of the decision of the Court of Appeal of California on November 12, 1997. (App., *infra*, 33a). The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 14, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

INTRODUCTION

This petition involves an error of constitutional dimension which not only significantly and unfairly impacted the outcome of the trial in this case, but also has serious ramifications for defendants involved in mass tort litigation in state courts. The advent of mass torts which began with the asbestos litiga-

tion has prompted state trial courts to adopt standardized and streamlined pleadings and pretrial practices. The danger inherent in this trend is the sacrifice of the constitutional rights of a particular defendant to considerations of judicial economy. This danger was realized in the instant action. More importantly, however, the appellate court in the instant action did not appreciate the danger or correct the constitutional error. It is precisely because a state appellate court completely neglected to address an obvious due process violation in the context of procedures designed to streamline a heavy asbestos caseload that certiorari should be granted. The federal circuit courts of appeal have acted to prevent the sacrifice of the constitutional rights of defendants to a trial court's attempts to attain judicial economy in mass tort litigation. The state appellate courts must be required to do the same.

In the instant action, plaintiffs originally named as defendants over fifty manufacturers and suppliers of asbestos and asbestos-containing products, usual defendants in cases alleging occupational or paraoccupational exposure to asbestos. The plaintiffs later amended the complaint to add allegations that the plaintiff used a consumer product, namely, Kent cigarettes with asbestos-containing filters, and to add Lorillard, Inc. ("Lorillard") and Petitioner Hollingsworth & Vose Company ("H&V") as defendants. The Amended Complaint contained a claim of fraud against Lorillard only. After the evidence had closed, the plaintiffs asserted for the first time a fraud claim against H&V which plaintiffs neither pled in their complaint nor raised at any point in the pre-trial or trial proceedings.

H&V had no notice of this claim and thus neither prepared nor presented a defense to a claim of fraud. Nevertheless, the trial judge submitted to the jury the plaintiffs' belated fraud claim against H&V and the jury found H&V liable for fraud. Because there was no evidence of fraud by H&V, the jury pre-

sumably imputed Lorillard's alleged fraud to H&V, as plaintiffs' lawyer urged them to do. The jury's finding on this wrongfully submitted claim necessarily tainted its entire verdict against H&V, including its subsequent award of punitive damages.

Because H&V had no notice of or an opportunity to be heard on a claim of fraud, the submission against H&V of plaintiffs' after-the-fact fraud claim violated H&V's right to due process under the United States Constitution. In affirming the trial court's decision, the California Court of Appeal did not directly address H&V's claim of a lack of notice of a fraud claim. Instead, it relied upon two references contained in a generic count for punitive damages to conclude that state court pleading requirements had been met. The Court of Appeal's conclusion ignores a well-settled state procedural rule which requires that claims of fraud be pled with specificity. This requirement is designed to provide civil defendants with adequate notice of claims levied against them. The Court of Appeal's decision sanctions the trial judge's submission of plaintiffs' fraud claim even in the absence of adequate notice, and thus conflicts with this Court's decisions requiring that defendants be afforded notice and an opportunity to be heard. Moreover, the arbitrary failure of the courts below to follow established rules of state court procedure undercut H&V's justified reliance on the fair administration of law and thus further violated H&V's constitutional right to due process.

In the absence of safeguards to ensure proper notice within the parameters established by state procedural rules, defendants such as H&V will be subjected to liability and punishment for conduct not attributable to them. The Court of Appeal's affirmance of the trial court's judgment thus raises important questions about the continued critical importance of due process notice in mass tort litigation, particularly in cases involving allegations of fraud.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner Hollingsworth & Vose ("H&V") is a manufacturer of technical papers located in East Walpole, Massachusetts. During World War II, in conjunction with the Naval Research Laboratory and the Army Chemical Corps, H&V manufactured filter material for Army and Navy gas masks. (Reporter's Transcript ("R.T.") at 1706-07.) The ingredient in the filter paper that made these gas masks so effective was asbestos. (R.T. at 1686.)

During the early 1950s, P. Lorillard Company's director of research, Dr. H. P. Parmele, inquired of H&V whether the gas mask filter paper could be adapted for use in a cigarette filter. (R.T. at 1810-12.) Thereafter, P. Lorillard and H&V Specialties Co., Inc. ("Specialities"), then an H&V subsidiary, entered into a written supply agreement whereby Specialties would supply P. Lorillard with rolls of bulk filter media, consisting primarily of cotton but containing some asbestos. (R.T. at 994-95, 2330; Plaintiffs' Exh. 105.) In 1952, P. Lorillard introduced Kent cigarettes made by Lorillard with filter media from Specialties. (R.T. at 1810-11.)

P. Lorillard's process of manufacturing filters for Kent cigarettes with Specialties' filter media was relatively inefficient and expensive. (R.T. at 1812.) Therefore, once an acceptable cellulose acetate filter became available, P. Lorillard changed the filter components and no longer needed Specialties' asbestos-containing filter media. (R.T. at 1811-25.) Specialties ceased production of the filter media in May 1956. (R.T. at 997, 1513.) In 1957, Specialities was merged into H&V. (R.T. at 2311.)

II. PROCEEDINGS IN THE TRIAL COURT

Milton Horowitz was diagnosed in August 1994 with mesothelioma. Dr. Horowitz and his wife Shirley Horowitz thereafter filed a complaint naming as defendants fifty-four companies, plus three hundred John Doe defendants, which manufactured or sold asbestos or asbestos-containing products such as insulation and gaskets. (App., *infra*, 34a-48a.). The complaint purported to state claims for negligence, strict liability, enterprise liability, false representation (Restatement of Torts § 402-3), loss of consortium, and punitive damages. One month later, Dr. Horowitz was told that for a time, Kent cigarettes were made using a filter that contained asbestos. The complaint was then amended to add allegations that Dr. Horowitz smoked Kent cigarettes with asbestos-containing filters and to add Lorillard and H&V as defendants. (App., *infra*, 49a-66a.)

Each count of the Amended Complaint began with a statement identifying the particular defendants to which that count applied. Counts I through IV of the Amended Complaint, which sounded in negligence and strict liability, and Count VI, for loss of consortium, pertained to all of the defendants and contained generalized allegations, not tailored to any one defendant or activity. Count V, for punitive damages, pertained to H&V, Lorillard and twelve of the asbestos defendants (plus 40 John Doe defendants). Like the negligence, strict liability and loss of consortium allegations, the punitive damages allegations were not specific to any one defendant but instead, without any details about any particular defendant's conduct, made general statements about the defendants' use of asbestos and knowledge of purported health risks.

Count VII, the cause of action for fraud, was expressly limited to Lorillard (and "Fortieth Doe through Fiftieth Doe"). It contained specific allegations about P. Lorillard's advertis-

ing for Kent cigarettes, including quotes from various print, radio and television ads, as well as allegations about the cigarette packaging. According to Count VII, Dr. Horowitz relied to his detriment on P. Lorillard's advertising and packaging which represented that Kent filtered cigarettes were safe. H&V was not mentioned in the fraud allegations.

There was no evidence at trial that H&V made any representations to the plaintiff nor was there evidence that H&V had any relationship whatsoever with the plaintiff. There was no evidence of any sort to suggest that H&V had any involvement in P. Lorillard's advertisements or product packaging or that its bulk supply contract with P. Lorillard somehow made it accountable for statements in those advertisements. In addition, there was no evidence of any sort that, during the years Kent cigarettes were on the market, H&V knew or should have known that the use of asbestos in the filter presented a health hazard to Kent smokers.

H&V reasonably predicated its pre-trial and trial strategy upon plaintiffs' decision to limit their fraud claim to Lorillard. Consequently, H&V did not prepare or present a defense to a claim of fraud. For example, H&V did not address fraud in its opening statement, assert objections to or participate in argument concerning the testimony of the advertising executive who worked for P. Lorillard on its Kent advertising campaign, or present any evidence regarding any aspect of fraud or H&V's lack of involvement in Kent advertising.

The plaintiffs never sought to amend the complaint to add a count for fraud against H&V. To the contrary, the plaintiffs first disclosed their intent to assert a fraud claim against H&V when they presented their proposed special verdict form, which contained numerous questions about the elements of fraud and asked the jury to answer all of the questions for both Lorillard and H&V. (R.T. at 2009-52.) This disclosure occurred after all parties had rested, when it was too late for

H&V to prepare or present a defense to new claims. H&V objected to the fraud questions, but the Court declined to rule on the objections and instead asked H&V to raise the issue in a motion for nonsuit. (App., *infra*, 68a-69a.)

H&V then moved for nonsuit with respect to the plaintiffs' unpled, and until that point nonexistent, fraud claim. H&V argued that it had no notice of a fraud claim and that there was insufficient evidence to support a fraud claim. (*Id.* at 68a-72a.) In argument on H&V's motion for nonsuit, plaintiffs did not point to evidence of fraud by H&V (there was no such evidence). Instead, plaintiffs contended that their fraud claim against H&V was premised on Specialties' relationship with P. Lorillard, which the plaintiffs characterized as a "joint venture." (*Id.* at 73a.) The plaintiffs argued that this "joint venture" relationship made H&V vicariously liable for P. Lorillard's advertising. This was the first mention by plaintiffs of a theory of joint venture. The Court denied the motion, without explanation. (*Id.*)

The Court proceeded to instruct the jury on the elements of intentional misrepresentation, negligent misrepresentation and fraudulent concealment. (R.T. at 2216-18, 2222-25.) It also instructed the jury that, "unless otherwise stated, the instructions apply to the case of each defendant." (R.T. at 2232.) There were no jury instructions about the prerequisites for imposing vicarious liability on one party for the acts of another, and no instructions on joint ventures. Plaintiffs' counsel, however, having been allowed to proceed on the fraud claim based on an alleged joint venture between H&V and P. Lorillard, then argued in closing that liability should and could be imposed upon H&V as to *all* claims because "they [H&V and Lorillard] were in this thing together." (App., *infra*, 74a.)

The special verdict form contained twenty-four questions, each of which the jury was to answer separately for both H&V

and Lorillard. (App., *infra*, 79a-88a.) Fifteen of the questions pertained to the elements of fraud, among them:

> Question 8: Did a defendant make a representation as to a past or existing material fact?
>
> Question 9: Was the representation false?
>
> Question 10a: Did the defendant know that the representation was false when it made it?
>
> Question 10b: Did the defendant make the representation recklessly without knowing whether it was true or false?
>
> Question 10c: Did the defendant make the representation without any reasonable grounds for believing it to be true?
>
> Question 11: Did the defendant make the representation with an intent to defraud the plaintiff?

(*Id.* at 82a-83a.) Despite the absence of evidence that H&V made any representation with respect to the cigarettes, the jury's answers to all of the special verdict form questions were the same for H&V and Lorillard. (*Id.* at 79a-88a.) The jury's allocation of the compensatory damage award was fifty percent to Lorillard and fifty percent to H&V. (*Id.* at 87a.)

The jury took a similar approach to the final question:

> Question 24: Do you find by clear and convincing evidence that any defendant was guilty

> of malice, oppression or fraud in the conduct on which you base your finding of liability?

The answer was "yes" for both Lorillard and H&V. (*Id.* at 87a-88a.)

H&V moved for a new trial on the grounds that the trial court erred in submitting to the jury the issue of fraud on the part of H&V and that there was insufficient evidence to support the jury's findings on fraud and punitive damages. (Clark's Transcript ("C.T.") at 2082-98.) The motion was denied and judgment entered. (C.T. at 2482.)

III. Proceedings In The California Court Of Appeal

In its appeal to the California Court of Appeal, H&V noted that (1) the first amended complaint did not allege fraud against H&V; (2) plaintiffs did not amend their complaint to allege fraud against H&V; (3) plaintiffs did not offer any evidence of fraud against H&V; and (4) plaintiffs did not indicate an intent to allege fraud against H&V until after both sides had rested their cases. (App., *infra*, 91a-106a.) H&V argued that because it had not received notice that a fraud claim was being asserted against it and did not defend against such a claim, the submission of the fraud claim to the jury and the resulting verdict against H&V constituted a violation of due process.

The Court of Appeal began its analysis by recognizing that the seventh cause of action, entitled "Fraud" was "alleged solely against Lorillard." (App., *infra*, 27a.) Because the complaint did not allege fraud against H&V, the Court of Appeal then attempted to justify the trial court's action by pointing to two aspects of the fifth cause of action, entitled "Punitive Damages". First, it noted that the punitive damages count in-

corporates by reference the allegations against Lorillard in the fraud count, suggesting that, by referencing the fraud allegations against Lorillard, the plaintiffs made those allegations applicable to H&V. (*Id.*) Second, the Court of Appeal focused on the plaintiffs' allegations, also in the punitive damages count, that the defendants "consciously and actively concealed and suppressed [their] knowledge" of the high risk of injury or death from asbestos exposure. (*Id.* at 28a-29a.) The Court of Appeal then concluded that the complaint sufficiently pled a cause of action for fraud against H&V. (*Id.* at 29a.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IGNORES THIS COURT'S MANDATE THAT A PARTY BE PROVIDED ADEQUATE NOTICE OF CLAIMS AGAINST IT AND DISPENSES WITH SETTLED PRINCIPLES OF STATE PROCEDURAL LAW UPON WHICH A PARTY IS ENTITLED TO RELY.

The asbestos-litigation crisis has prompted trial courts to fashion a number of novel case management tools in an attempt to process essentially uniform asbestos cases quickly and efficiently. These efforts include standardized pleadings, standardized discovery, and other modifications of rules of civil procedure, *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982), the liberal use of consolidated trials, *Malcolm* v. *National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993), and the settlement-class certification recently confronted by this Court in *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S.Ct. 2231 (1997). Underlying these novel approaches is the belief that asbestos claims are such "mature torts" that the parameters of any lawful claims against defendants who manufactured asbestos for occupational use are by

now well-defined, thoroughly understood, and completely disclosed. Because of the frequent repetition of the same claims against the same group of defendants, the requirements of notice are generally satisfied by the barest of procedural safeguards, such as standardized pleadings. However, the addition of an atypical asbestos defendant such as Petitioner Hollingsworth & Vose Company ("H&V"), atypical claims such as those involving Kent cigarettes, and unique claims such as fraud based on misrepresentations in cigarette advertising undermines the basic assumptions justifying the move towards streamlined asbestos pleadings and practices. In the atypical case, there is a very real danger that a particular defendant's basic constitutional rights will be improperly sacrificed to considerations of convenience and economy. *See Malcolm*, 995 F.2d at 350. This danger was realized in the instant action.

In its decision below, the California Court of Appeal did not address whether H&V actually received notice of the alleged fraud claim but merely concluded that the plaintiffs had satisfied California pleading requirements based upon certain references contained in the standardized asbestos complaint. (App., *infra*, 27a-29a.) The Court of Appeal thus relied upon its apparent assumption that in mass asbestos litigation, generic pleadings will provide sufficient notice to defendants of all those claims asserted against them. However, because the plaintiffs' claims against H&V regarding Dr. Horowitz's alleged use of Kent cigarettes are entirely distinct from the typical claims of plaintiffs who are occupationally exposed or paraoccupationally exposed to asbestos, this assumption is false. By relying exclusively on its tortured reading of the standardized asbestos complaint, without regard for the issue of proper notice, the Court of Appeal ignored this Court's mandate that a defendant be afforded notice of all claims brought against it.

A. *The Court Of Appeal Ignored The Fundamental Constitutional Principle That A Party Is Entitled To Notice Of All Claims Asserted Against It.*

Notice and opportunity to be heard are the fundamental aspects of the constitutional right to due process. U.S. Const. amend. XIV; *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). Thus, courts "must always exhibit awareness of the defendant's inalienable right to know in advance the nature of the cause of action being asserted against him." *Rodriguez* v. *Doral Mortg. Corp.*, 57 F.3d 1168, 1171 (1st Cir. 1995), citing *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 506 (1959) and *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). When a civil action is resolved against a party on the basis of a legal theory of which the party had no notice, the constitutional guaranty of due process is violated. *Doubleday & Co., Inc.* v. *Curtis*, 763 F.2d 495, 502-03 (2d Cir.) (court violated defendant's due process rights by dismissing counterclaim based on waiver theory which had not been at issue at trial), *cert. dismissed*, 498 U.S. 941 (1985); *Jimenez* v. *Tuna Vessel "Granada"*, 652 F.2d 415, 421-22 (5th Cir. 1981); *Armstrong Cork Co.* v. *Lyons*, 366 F. 2d 206, 208-09 (8th Cir. 1966).

Ordinarily, pleadings provide a party with the requisite notice of the claims asserted against it, thereby enabling a party to answer and prepare for trial. *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993), quoting *Conley*, 355 U.S. at 47 (pleadings require party to give statement of claim that will give defendant fair notice of claim and grounds upon which it rests). *See Walker* v. *South Cent. Bell Tel. Co.*, 904 F.2d 275, 278 (5th Cir. 1990) (notice is "touchstone" by which sufficiency of pleadings is determined). Indeed, providing a party with adequate notice is the principal purpose of pleadings. *Salahuddin* v. *Cuomo*, 861

F.2d 40, 42 (2d Cir. 1988). To provide proper notice, a party's complaint must inform an adversary of the "nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Hein* v. *Arkansas State University*, 972 F. Supp. 1175, 1180 (E. D. Ark. 1997). *See Leatherman*, 507 U.S. at 168. Absent proper pleadings, a defendant cannot possibly be expected to mount a defense to charges that have never been brought and allegations that have never been made. *Kelly* v. *Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986) (complaint must provide enough information and detail to enable defendants to respond and defend).

It is settled that, under California law, in order to provide an adversary with adequate notice when alleging a fraud claim, a party must plead that claim with specificity. *Goldrich* v. *Natural Y Surgical Specialties, Inc.*, 31 Cal. Rptr. 2d 162, 168 (Cal. Ct. App. 1994) ("[f]raud must be pleaded with specificity, to provide the defendants with the fullest possible details of the charge so they are able to prepare a defense"); *Committee on Children's Television, Inc.* v. *General Foods Corp.*, 673 P.2d 660, 672 (Cal. 1983) (one purpose of specificity requirement is to provide notice to the defendant so that fraud charges can be intelligently met). A properly pleaded fraud claim, therefore, includes facts regarding how, where and by whom the fraud was accomplished.[1] *Roberts* v. *Ball,*

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[1] Courts interpreting the applicable federal rule have held that pleading fraud with particularity requires allegations about the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff. *See e.g., Vicom, Inc.* v. *Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777-78 (7th Cir. 1994); *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990) (stating that rule 9(b) "particularity" means "the who, what, when, where, and how: the first paragraph of any newspaper story"); *In re Stac Electronics Securities Litig.*, 89 F.3d 1399, 1404 (9th Cir. 1996), *cert. denied sub nom., Anderson* v. *Clow*, ___ U.S. ___, 117 S. Ct. 1105 (1997). In so concluding, federal courts have also reasoned that because fair notice is the most basic consideration underlying the specificity requirement, plaintiffs must "reasonably notify

Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 905 (Cal. Ct. App. 1976); *Hall* v. *Department of Adoptions*, 121 Cal. Rptr. 223, 227 (Cal. Ct. App. 1975). When asserting a fraud claim against a corporation, the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. *Tarmann* v. *State Farm Mutual Auto. Ins. Co.*, 2 Cal. Rptr. 2d 861, 862-63 (Cal. Ct. App. (1991). Absent such details, it is recognized that a defendant will be unable to understand and respond to the charges made. *Community Cause* v. *Boatwright*, 177 Cal. Rptr. 657, 664 (Cal. Ct. App. 1981); *Roberts*, 128 Cal. Rptr. at 905.

In the instant case, the Court of Appeal upheld the submission of the fraud claim against H&V in the absence of notice by disregarding the requirement that fraud must be pled with specificity. As conceded by the Court of Appeal, the Amended Complaint clearly and expressly limited the fraud claim to Lorillard, excluding all of the other defendants from that cause of action. (App., *infra*, 27a, 63a.) Indeed, the pleadings did not allege that H&V made any representations of any kind, nor did they contain any allegations connecting H&V to P. Lorillard's advertising. (*Id.* at 63a.) Because the fraud claim was expressly limited to Lorillard, the Court of Appeal attempted to justify the trial court's decision to submit the fraud claim against H&V to the jury by pointing to other sections of the complaint.[2] The generic references relied upon by the court,

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the defendants of their purported role" in an alleged fraudulent scheme. *Vicom*, 20 F.3d at 777-78, quoting *Midwest Grinding Co., Inc.* v. *Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992). *Accord Billard* v. *Rockwell Int'l Corp.*, 683 F.2d 51, 57 (2d Cir. 1982).

[2] In its opinion, the Court of Appeal (1) completely ignored the arguments of the plaintiffs which implicitly conceded a lack of notice in the pleadings; (2) crafted a new argument which attempted to parse the pleadings; and (3) completely

however, were incapable of apprising H&V of the existence of any alleged claim of fraud against it.

First, the Court of Appeal noted that the punitive damages count incorporates by reference the allegations in the fraud count against Lorillard, suggesting that, by referencing the fraud allegations against Lorillard, the plaintiffs made those allegations applicable to H&V. (App., *infra*, 27a-28a.) The fraud count against Lorillard, however, neither referenced H&V explicitly nor referred to H&V or H&V's relationship with Lorillard in any way. To the contrary, the fraud count was prefaced by a statement expressly limiting the claim to Lorillard. (*Id.* at 27a, 63a.) The only significance of the incorporation by reference is that it made clear that plaintiffs were seeking to impose punitive damages *on Lorillard* based in part on P. Lorillard's advertising and packaging.

Second, the Court of Appeal focused on the plaintiffs' allegations, also contained in the punitive damages count of the standardized asbestos complaint, that the defendants "consciously and actively concealed and suppressed [their] knowledge" of the high risk of injury or death from asbestos exposure. (App., *infra*, 29a, 46a, 61a.) But the allegations in this count cannot possibly be said to have put H&V on notice of the fraud claim.[3] The punitive damages allegations are applicable to 15 diverse defendants (plus 40 John Doe defen-

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ignored the real question whether, in fact, H&V had actual notice of a claim of fraud.

[3] That an award of punitive damage is dependent upon a jury's finding of malice, oppression, or fraud did not provide H&V with notice of an independent tort cause of action for fraud. A jury cannot award punitive damages absent a finding of liability on a separate independent tort cause of action. *Gagnon* v. *Continental Casualty Co.*, 260 Cal. Rptr. 305, 307 n. 5 (Cal. Ct. App. 1989). Where there is no logical nexus between the separate tort causes of action contained in the complaint — negligence and strict liability — and fraud, the fact that fraud is one basis for imposing punitive damages constitutes neither an independent claim for fraud nor notice of such a claim. *See Myers Bldg. Indus. Ltd.* v. *Interface Tech. Inc.*, 17 Cal. Rptr. 2d 242, 249 (Cal. Ct. App. 1993).

dants) and contain no specifics about any one of them. In fact, the punitive damages claim from which H&V was to have gleaned notice remained unchanged from the punitive damages claim contained in the original asbestos complaint alleged against the original occupational exposure asbestos defendants. (App., *infra*, 44a-46a, 59a-61a.) Nowhere in the claim for punitive damages do plaintiffs identify the persons at H&V who allegedly committed the fraud or the manner in which the alleged fraud was accomplished by H&V. The Court of Appeal failed to explain how either the punitive damages count against 15 diverse defendants and the fraud claim against Lorillard provided any of the specific details that had heretofore been required in pleading fraud.

Moreover, the generic allegations in the punitive damages count must be considered against the backdrop of Count VII, the explicit fraud claim brought against Lorillard and not H&V. Given an explicit fraud count against Lorillard, H&V had a right to expect that any fraud claim against it would not be contained in a punitive damages claim applicable to numerous unrelated defendants. At a minimum, H&V had a right to expect that, if plaintiffs sought to hold H&V liable as a joint venturer with Lorillard for fraud, the complaint would have contained an allegation to that effect.

B. *The Court Of Appeal Dispensed With A Rule Of Procedure Upon Which H&V Had Justifiably Relied When Formulating Its Pre-trial And Trial Strategy.*

The Court of Appeal's implicit conclusion that the complaint provided H&V with adequate notice of the fraud claim cannot be reconciled with the requirement that fraud be pled with specificity. H&V justifiably relied on this specificity re-

quirement and expected not only that it would receive notice of any fraud claim but that the rule requiring an adversary plead fraud with specificity would be adhered to by the trial court and the Court of Appeal. Rendering the rule that a party must plead fraud with specificity a nullity after a party has proceeded in reliance on such a rule is fundamentally unfair and a violation of due process. *Zuluaga* v. *United States*, 971 F. Supp. 616, 619 (D. Mass. 1997) (primary determinant of whether modification to procedural rule impairs rights is strength of any reliance interest in outmoded procedure); *Berkovitz* v. *Home Box Office, Inc.*, 89 F.3d 24, 30 (1st Cir. 1996) ("[w]hen a court charts a procedural route, lawyers and litigants are entitled to rely on it"); *see United States* v. *Caceres*, 440 U.S. 741, 752-753 (1979) (reliance upon agency regulations implicates due process). Such is particularly the case here, where, in light of H&V's reasonable expectation that fraud would be pled with specificity, the Court of Appeal's abrogation of the rule rendered the alleged notice itself constitutionally insufficient.

In the Amended Complaint, plaintiffs brought a claim of fraud against Lorillard only and accordingly offered no evidence at trial to establish fraud against H&V. Thus, the plaintiffs had no reason to, and did not, move to amend the pleadings to conform to evidence at trial. *See* Cal. Code Civ. P. § 469; *Bruckman* v. *Parliament Escrow Corp.*, 235 Cal. Rptr. 813, 818 (Cal. Ct. App. 1987) (unpled claim may be added only if "the claim was thoroughly explored during trial, and the theory of the trial [was] well known to court and counsel").

The plaintiffs' failure to introduce evidence of fraud by H&V confirms that the plaintiffs did not, and did not intend, to plead fraud against H&V in the Amended Complaint. In its decision, however, the Court of Appeal not only failed to address whether H&V received actual notice of the alleged fraud claim, but also failed to address H&V's argument that there

was insufficient evidence to support the jury's finding of fraud by H&V. (App., *infra*, 98a-103a.) When the pleadings do not provide adequate notice of a claim, the reviewing court's inquiry must focus on whether a review of the evidence introduced at trial demonstrates that "the parties recognized that an issue not presented by the pleadings entered the case at trial." *Jimenez* v. *Tuna Vessel "Granada"*, 652 F.2d 415, 421 (5th Cir. 1981). *See Bruckman v. Parliament Escrow Corp.*, 235 Cal. Rptr. 813, 818 (Cal. Ct. App. 1987). The Court of Appeal's decision to parse the complaint to construct a fraud claim against H&V, rather than simply to review the evidence, confirms that there was no evidence of fraud by H&V. Moreover, the Court of Appeal's failure to conduct an inquiry into the sufficiency of the evidence, coupled with its dissection of the Amended Complaint to construct a fraud claim against H&V, reflects the Court's apparently irrebuttable presumption that generic allegations in a standardized asbestos complaint will provide sufficient notice to all defendants of all claims in asbestos litigation.

H&V did not learn of the alleged fraud claim against it until after the close of evidence, when the plaintiffs proposed that their special verdict questions — including their questions on fraudulent misrepresentation — be answered separately for both Lorillard and H&V. Because H&V learned of the fraud claim only after the close of evidence, H&V had no opportunity to present evidence in defense to a claim of fraud.[4] A liti-

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[4] The plaintiffs, in effect conceding that the Amended Complaint did not provide H&V with notice of the fraud claim, argued in their brief to the Court Appeal that H&V should have gleaned notice of the fraud claim from three generalized references to the fraud claim made during the month of the trial. The Court of Appeal did not address this argument. The absurdity of the plaintiffs contention, however, that generalized references regarding fraud in immediate pre-trial arguments and in opening statements could ever provide sufficient notice of a claim that heretofore was required to be pled with specificity, points out the very nature of the unfairness to H&V of how this trial proceeded. H&V was not informed in

gant's due process rights include the right to litigate the issues in its case fully and fairly. *Blonder-Tongue Lab., Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 329 (1971); *Rodriguez* v. *Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995) (at a bare minimum defendant must be allowed a meaningful opportunity to mount a defense); *duPont* v. *Southern Nat. Bank*, 771 F.2d 874 (5th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986). Denied this right, H&V reasonably did not defend against this claim at trial. H&V did not seek to establish that it never made any statements upon which plaintiffs relied nor did H&V's counsel mention fraud in H&V's opening statement. In fact, in the presence of plaintiffs' counsel, H&V's counsel expressly stated that the testimony of Mr. Thompson, an advertising executive from Young & Rubicam who worked for P. Lorillard and upon whom plaintiffs' counsel relied heavily to establish Lorillard's fraud, "has nothing to do with my client" because Thompson "was an advertising man for Lorillard." (App., *infra*, 67a.)

It is grossly unfair to impose liability based on a claim which the defendant never had a chance to address or defend. *Jimenez* v. *Tuna Vessel "Granada"*, 652 F.2d 415, 421-22 (5th Cir. 1981). Thus, in *Jimenez*, the court found that the defendants' due process rights were violated because they did not get fair notice of the unpled theory and thus were subject to "trial by ambush." *Id.* at 420. The submission of the fraud claim in this case likewise amounted to "trial by ambush" and a violation of H&V's due process rights; unlike in *Jimenez*, however, the Court of Appeal refused to correct the constitutional error made by the trial court. *See id.* at 421-22.

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an orderly and constitutional manner of the claims it was defending, and the plaintiffs were allowed to pursue an unpled and untried fraud claim against H&V. *See Rodriguez* v. *Doral Mortg. Corp.*, 57 F.3d 1168, 1171-1172 (1st Cir. 1995) (fleeting reference to a particular theory of liability in pre-trial order not sufficiently informative to satisfy notice requirement).

II. THE FAILURE TO PROVIDE H&V WITH NOTICE OF THE FRAUD CLAIM NECESSARILY TAINTED THE JURY'S VERDICT AGAINST H&V, INCLUDING THE PUNITIVE DAMAGES AWARD.

The serious consequences of disregarding a defendant's right to notice and an opportunity to be heard are illustrated by the jury's findings and verdict in this case. H&V had no reason to defend against a fraud claim which plaintiffs brought against Lorillard only. Despite both the absence of any evidence against H&V regarding fraud and the absence of any evidence of a joint venture between H&V and Lorillard, the jury held H&V liable for Lorillard's alleged fraud. This finding of fraud necessarily tainted the jury's later findings on the question of punitive damages. Indeed, after finding that the elements of the improperly submitted fraud claims were satisfied, the jury had no choice but to answer "yes" to the special verdict form's question whether H&V's conduct constituted "oppression, malice or *fraud*." (App., *infra*, 87a-88a) (emphasis added). By finding H&V liable on this wrongfully submitted fraud claim, a finding of punitive damages based on fraud was a foregone conclusion.

In submitting the fraud claim against H&V, the trial court refused to distinguish between Lorillard and H&V. Indeed, the jury's answers to the special verdict questions also make clear that the jury, no doubt confused by the new assertion of joint venture liability and not guided by an instruction from the court, ignored the very real distinction between the two companies. The jury never would have made these unsupported findings and reached the verdict it did had the trial court properly limited the issues it submitted to the jury to those of which H&V had notice and an opportunity to be heard, as the court was constitutionally required to do. The Court of Appeal, however, ignored the fundamental principle

that H&V had a right to notice that a fraud claim was being asserted against it and, through a tortured reading of the complaint, condoned the trial court's action of allowing an unpled and untried claim to be submitted to the jury.

CONCLUSION

The decision below conflicts with relevant decisions of this Court establishing the absolute right of a party to receive notice of claims asserted against it and an opportunity to address the merits of such claims. By abrogating established rules of procedure upon which H&V justifiably relied, however, the Court of Appeal avoided the application of these fundamental principles.

Absent review by this Court, the decision below will have substantial and deleterious ramifications far beyond the particular parties and facts at issue in this case. Faced with the challenges presented by the rise of mass tort litigation, "judges throughout the country have reacted with commendable ingenuity." *Malcolm*, 995 F.2d at 350. However, the benefits of efficiency can never be purchased at the expense of fundamental principles of constitutional law. *Id.* This petition presents the Court with the opportunity to instruct state appellate courts that it is their responsibility to ensure the preservation of a particular litigant's federal constitutional right to receive notice and an opportunity to be heard on all claims brought against it, even in the face of mass tort litigation and a trial court's otherwise laudable case management system for simplifying and expediting mass tort claims.

For all the reasons set forth above, H&V requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

HOLLINGSWORTH &
VOSE COMPANY

By its attorneys,

ANDREW J. McELANEY, JR.
Counsel of Record
STEPHEN J. BRAKE
DANIEL P. OLOHAN
NUTTER, MCCLENNEN & FISH, LLP
One International Place
Boston, Massachusetts 02110-2699
(617) 439-2000

DONALD F. ZIMMER, JR.
PREUSS WALKER & SHANAGHER, LLP
595 Market Street, 16th Floor
San Francisco, CA 94105-2825
(415) 978-2600

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APPENDIX A.

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IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED

Court of Appeal-First App. Dist.
AUG 12 1997
RON D. BARROW, CLERK
BY _____
DEPUTY

MILTON HOROWITZ et al.,	
Plaintiffs and Respondents,	**A072695**
vs.	
LORILLARD, INC., et al.,	**(San Francisco County**
Defendants and Appellants.	**Super. Ct. No. 965245)**

Defendants/appellants Lorillard, Inc. (Lorillard) and Hollingsworth & Vose Company (H&V) appeal a judgment on special verdict in an action brought by plaintiffs/appellants Milton and Shirley Horowitz for personal injuries arising from Milton smoking cigarettes manufactured by appellants containing filters comprised of asbestos material.[1] We affirm.

[1] Milton Horowitz died on March 31, 1996, during the pendency of this appeal.

BACKGROUND

Between March 1952 and May 1956 Lorillard's predecessor, P. Lorillard Company (P. Lorillard), manufactured and sold more than 13 billion Kent cigarettes with "Micronite" filters containing crocidolite asbestos. In 1956 appellants ceased producing Kent asbestos-containing filter cigarettes because nonasbestos filters were less expensive to produce and had an easier "draw." Between February 1952 and May 1956 H&V manufactured and supplied P. Lorillard with the bulk asbestos-containing filter material used in the Kent filter cigarettes.

In August 1994 Milton, a clinical psychologist, was diagnosed with mesothelioma, a type of lung cancer resulting from asbestos exposure. He began smoking cigarettes in 1944 and smoked various brands until the spring of 1952 when he began smoking regular size Kent filter cigarettes. In 1954 he switched to smoking king size Kent filter cigarettes, which he continued to smoke until he quit smoking in January 1963. He smoked about one pack of cigarettes per day. He began smoking Kent cigarettes because of advertising which suggested they were "safe," "good for one's health" and more successful at filtering out tar and nicotine, and because his physician friends were convinced "Kents were the cigarette[s] to smoke."

Other than his exposure to asbestos-containing Kent cigarettes, Milton related the following potential asbestos exposure history: In 1946, while in the military, he spent 13 days aboard a troop ship in poor condition, with asbestos-containing steam pipes which vibrated, releasing asbestos fibers. Between 1954 and 1956 he worked in an office building located 80 to 100 feet from a construction site at which asbestos-containing building materials might have been used, and walked past the site while construction work was in progress. In 1964 he

moved to California and between 1966 to 1968 may have been exposed to asbestos-containing building materials used at a construction site near his office. Finally, he may have been exposed to asbestos in 1987 or 1988 when asbestos-containing ducts were professionally removed from his home. However, this last exposure was ruled out as a contributing cause of his mesothelioma because his malignancy already existed by that time.

Respondents presented evidence of experiments conducted in 1954 and in the early 1990's which concluded that during human smoking of original Kent filter cigarettes manufactured between 1952 and 1956, crocidolite asbestos fibers were released into the smoke.

Several medical experts testified on behalf of respondents on the issue of causation. Pulmonologist Dr. Barry Horn testified that mesothelioma is dose dependent, i.e., the risk of contracting the disease increases with the amount of asbestos fibers inhaled and the intensity of the exposure. He also stated that exposure to crocidolite asbestos is the most carcinogenic-causing form of asbestos likely to cause mesothelioma. Horn concluded that Milton's asbestos exposure from smoking asbestos-containing filter cigarettes was the greatest factor contributing to his mesothelioma.

Pathologist Dr. Samuel Hammar concluded that Milton's asbestos exposure from inhaling Kent asbestos-containing cigarettes was the "most likely" cause of his mesothelioma.

Dr. William Nicholson, an expert in health risk assessment regarding asbestos-related disease, opined that based on a qualitative analysis of Milton's various asbestos exposures, smoking Kent asbestos-containing cigarettes was the greatest contributing cause of his mesothelioma.

In December 1994 respondents filed their first amended complaint against appellants alleging a number of causes of action, including negligence, strict liability and fraud.

Following the first phase of trial on the issue of liability and compensatory damages the jury returned a special verdict containing the following findings: (1) appellants' Kent cigarettes with asbestos-containing filters were defective, and the defect was a cause of Milton's injury; (2) appellants' negligence was a cause of Milton's injury; (3) appellants made false representations with an intent to defraud Milton and he detrimentally relied on such representations; and (4) appellants intentionally concealed or suppressed facts with the intent to defraud Milton, causing him damage. The jury awarded Milton $1,050,000 in compensatory damages and his wife, Shirley, $250,000 for loss of consortium. It found appellants each liable for 50 percent of respondents' injuries. In the second phase on punitive damages, the jury assessed $560,000 in punitive damages against Lorillard and $140,000 against H&V.

DISCUSSION

I

Appellants contend the court erred on relevance grounds in admitting testimony and photomicrographs regarding experiments performed in 1954 by electron microscopist Ernest Fullam. Alternatively, they argue that even if relevant, the photomicrographs were inadmissible because they were not sufficiently authenticated.

"Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant [citations]; (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation]; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury [citation]. [¶] In the case of experimental evi-

dence, the preliminary fact [citation] necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the [event in question] took place. The standard that must be met in determining whether the proponent of the experiment has met the burden of proof of establishing the preliminary fact essential to the admissibility of the experimental evidence is whether the conditions were substantially identical, not absolutely identical." (*Culpepper* v. *Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521 (*Culpepper*) ; *DiRosario* v. *Havens* (1987) 196 Cal.App.3d 1224, 1231; accord *People* v. *Bonin* (1989) 47 Cal.3d 808, 847.)

A.

In January 1954 P. Lorillard hired Althea Revere and Wanda Farr to study the filter material in Kent filter cigarettes. By April 1954 Revere observed traces of asbestos in the cigarette smoke. As part of its program of "work[ing] out a method for the elimination of [asbestos] in the smoke," P. Lorillard hired Fullam in February 1954 to determine if asbestos was emitted from the filters during "normal use."

In an April 1954 letter, P. Lorillard's research director, H.B. Parmele, stated that Fullam had recently examined "Kent smoke" and confirmed Revere's earlier finding that the smoke contained traces of asbestos, and had begun to examine the smoke from over "a dozen lots of treated Kents."

In July 1954, Parmele sent Fullam 20 packages of Kent cigarettes divided into four 5-package samples, described as follows: "Sample number 1, five packages long vacuum cleaning. Sample number 2, five packages regular Kents. Sample number 3, five packages gelatin sprayed. Sample number 4, five packages new type experimental Micronite filter." Fullam was asked to observe the relative amounts of

mineral fiber in the smoke from these four sample lots "following the same general technique which you used in the investigation prior to this." Parmele noted, "We are very anxious to have the smoke from our cigarettes as free of [asbestos] fiber as possible — at least as free as or as pure as the air which we normally breathe." In August Parmele complimented Fullam on his findings and the quality of his work, and indicated interest in the "results" obtained with samples three and four. However, the record does not identify or describe the results to which Parmele referred.

In early October 1954 Parmele sent Fullam "a package containing 12 samples of Kent cigarettes, labeled from 1 to 12," representing "various treatments which we are currently trying in hopes of reducing the occurrence of [asbestos] fiber in the smoke." Fullam was asked to examine the smoke from each sample and determine whether P. Lorillard had been successful.

In late October 1954 Parmele sent Fullam "six more lots of Kent cigarettes numbered from 13 to 18." Each lot represented a "different treatment" for eliminating asbestos fibers in the smoke. Fullam was asked to subject these cigarettes to his "regular test procedure" and inform him of the results.

In a December 1954 letter to Harold Knudson, H&V's technical director, Parmele stated that Fullam's "data" made "very little sense," and Parmele questioned the advisability of sending him further cigarette samples, particularly in light of P. Lorillard's intention to eliminate the use of asbestos in the near future. Again, the record does not explain the "data" to which Parmele referred.

Electron microscopist Douglas Hallgren worked with Fullam from 1954 until 1964 and was involved in the Kent cigarette experiments. The purpose of the project was to determine how much of the asbestos component of the filter was emitted during the smoking process. He and Fullam conducted their

examinations of the samples in the same way. Hallgren testified that Fullam had created a procedure and an apparatus whereby the cigarettes could be smoked in a manner which "simulated a person smoking." He and Fullam made certain there was no cross-contamination between the cigarette samples. They then made photomicrographic plates of the collected materials, and Hallgren made photographic prints of all the plates. Procedures existed to avoid contamination of the films prepared. Prior to Hallgren's working at Fullam's laboratory, Fullam created two control photographs by extracting and photographing asbestos particles from a Kent filter cigarette (exhibits 44 and 45). Hallgren understood that these control photographs were used as reference points for the asbestos particles they were looking for in Kent cigarette smoke. Although Lorillard was unable to produce any written reports from the Fullam experiments, Hallgren stated that he and Fullam would have prepared and sent P. Lorillard reports on a regular basis at the end of testing each group of samples.

Hallgren testified that he recognized several particular electron micrographs of material collected from sample number 2, which the July 20, 1954, letter described as regular Kents." Those particular micrographs showed small clusters of asbestos fibers.

From his work with Fullam, Hallgren concluded that asbestos fibers were being "extracted from the cigarettes" during the smoking process, and the source of asbestos recorded on the electron micrographs came from the cigarettes. This conclusion was supported by the "overwhelming" number of "clearly asbestos" particles found, which could not have been attributed to contamination.

On cross-examination Hallgren stated that only a small number of cigarettes were smoked to collect the sampled material. Each cigarette was smoked for "a few, five minutes." No written protocol was created, but the same procedures were

used with each sample. All samples tested came from P. Lorillard with sample numbers attached. Some of the cigarettes were loose, and others were in packages affixed with the Kent logo. "[S]ome" or "[a] great many" were experimental variations. He and Fullam did no testing to determine whether the asbestos particles found came *from* the cigarette or *through* the cigarette.

Hammar was shown several Fullam micrographs and testified that they depicted crocidolite asbestos fibers.

In particular, appellants contend the Fullam tests were irrelevant because there is no evidence that: (1) the Kent cigarettes smoked to produce the photomicrographs were those publicly available; (2) the structures visible in the micrographs are in fact asbestos; and (3) any asbestos shown in the micrographs came from the Kent filters as opposed to from outside contamination.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The admission of demonstrations, experiments and tests is a matter of discretion for the trial court and will not be reversed on appeal absent a clear abuse of that discretion. (*Culpepper, supra,* 33 Cal.App.3d at p. 522.)

We conclude the evidence was relevant. P. Lorillard commissioned Fullam to study the presence of asbestos particles released into the smoke from Kent filter cigarettes in "normal use." Hallgren testified that he and Fullam tested at least some experimental Kent cigarettes, reasonably permitting the inference that some of the Kent cigarettes tested were nonexperimental. The test procedure simulated normal smoking, and there is substantial evidence that procedures were taken to eliminate contamination. Hallgren and Hammar both opined that asbestos was depicted in the micrographs and Hallgren opined that asbestos was emitted in the Kent cigarette smoke,

confirming earlier testing by Revere and Farr. Finally, appellants offered no evidence that the cigarettes tested were not those sold to the general public.

B.

Appellants maintain that even if Fullam's test conditions were relevant, his photomicrographs were not properly authenticated. "To authenticate a photograph, a foundation must be laid by showing that the picture is a faithful representation of the objects or persons depicted. The showing must be made by a competent witness who can testify to personal knowledge of the correctness of the representation." (2 Witkin, Cal. Evidence (3d ed. 1986) Demonstrative, Experimental and Scientific Evidence, § 840, p. 806.) The photographer's testimony is not necessary to authenticate a photograph. (*Adams* v. *City of San Jose* (1958) 164 Cal.App.2d 665, 667.) Whether or not a photograph is sufficiently authenticated is a matter within the discretion of the trial court and its decision will be upheld absent an abuse of discretion. (*Id.* at pp. 667-668.)

Appellants argue that (1) the two control micrographs (exhibits 44 and 45) were prepared by Fullam before Hallgren started working with him and when Hallgren was not present, and no evidence was presented that they contained asbestos fibers from publicly available Kent cigarettes; (2) there is no evidence Hallgren was present when the photomicrographs were allegedly made during experiments with "sample 2" (exhibits 47-50), he could not testify that the sample was taken from smoking sample 2 cigarettes, and no evidence was offered that the photomicrographs are fair representations of what they purport to show; and (3) no evidence was offered as to who tested "sample 5 from the November series" or that the

micrograph depicted in exhibit 52 fairly represented what it purports to show.

Appellants' argument is unpersuasive. Hallgren testified that the control photomicrographs show asbestos fibers extracted from Kent cigarettes. For control purposes they need not have been the publicly available cigarettes — their only purpose was to demonstrate the appearance of asbestos fibers. He further testified that he and Fullam utilized "exactly" the same technique in examining the cigarette samples, and that exhibits 47-50 are representative of asbestos fibers extracted from sample 2 regular Kent cigarettes. Hallgren testified extensively as to his and Fullam's method of storing and labeling the photomicrographs and record-keeping procedure, and that no one else utilized the laboratory.

Given Hallgren's extensive involvement in Fullam's project and their use of identical techniques in conducting the experiments and creating and storing the photomicrographs, the trial court did not abuse its discretion in determining the photomicrographs were adequately authenticated. Even assuming the photomicrographs were improperly authenticated, any error in their admission is harmless, since the Revere/Farr and Longo studies (see part II, *infra*) established that asbestos was released from appellants' cigarettes during smoking.

II

Appellants next contend the court erred in admitting testimony and exhibits regarding experiments conducted by Dr. William Longo.

At trial appellants moved in limine to exclude evidence of the Longo experiments on the grounds that (1) the cigarettes used are not representative of samples sold between 1952 and

1956; and (2) Longo's first experiment, MAS1,[2] utilized a nonautomated smoking machine which did not replicate average human smoking. During Longo's testimony appellants interposed a general "foundational" objection thereto, without specifying more.

On appeal appellants contend (1) there was no evidence that the samples tested and the manner in which they were tested were substantially similar to the manner in which Milton smoked Kent cigarettes; (2) the experiments were irrelevant because Longo failed to test a statistically significant sample, making it impossible to generalize his results; and (3) the experiments did not meet the standards for admissibility of new scientific techniques under the *Kelly/Frye* standard. (See *People* v. *Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye* v. *United States* (D.C. Cir. 1923) 293 F. 1013 (*Frye*).) Appellants further contend Longo was not qualified to offer testimony regarding the scientific consensus on his methods and was not impartial because his experiments were paid for by attorneys, and the experiments did not utilize correct scientific procedures.

Longo has a Ph.D. in engineering and material science, and is an electron microscopist and president of MAS, specializing in asbestos analysis. In mid-1989 John Slade, M.D., asked Longo to analyze some "original" Kent filter cigarettes to determine whether and in what concentration they contained asbestos. Slade provided Longo with four or six packs of unopened Kent cigarettes in their "original condition." The cellophane was intact, there was no observable damage or discoloration, and the foil under the cellophane was intact. Packs one and two were original Kents from 1954 or 1955. Some of the other packs were cigarettes produced in the 1960's and 1970's.

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[2] MAS is an abbreviation for Longo's company, Materials Analytical Services.

In 1989 Longo visually examined some original Kent cigarettes from 1952, and determined they were "the same" and in the same condition as those from 1955. Electron microscopy of the unsmoked filters revealed no deterioration or degradation of any component. Although Longo did not know the precise history of the cigarettes Slade provided, there was no evidence of degradation, and he opined the cigarettes were in "excellent condition." He determined the cigarettes had lost some humidity over the 40-year period, and restored them using a protocol published in an article he found in a 1952 issue of the Journal of the American Medical Association. The dehydration and subsequent rehydration were unlikely to cause the release of asbestos fibers.

In June 1991 Longo performed an experiment (MAS1) to determine if crocidolite asbestos was released from original, 40-year-old Kent cigarettes during smoking. The experiment was paid for and videotaped by attorneys. Longo designed and utilized a hand-held, nonautomated smoking machine in which a syringe was modified to hold a vertically positioned cigarette. Twelve cigarettes were tested in MAS1, although only nine were actually smoked. Six of the nine smoked cigarettes were pinched and rolled between the fingers to simulate what people sometimes do when smoking. To create a laboratory control, the MAS1 test was also run using "new" cigarettes not containing asbestos, and run without cigarettes in the apparatus. Each cigarette tested had two "puffs" taken, simulated by pulling back the syringe. After each puff the cigarette was allowed to remain vertical in the syringe to let the smoke dissipate. Some cigarettes stayed in the syringe for a day or two between the two puffs. Thereafter the syringe was filled with water and shaken to help distribute the particles evenly through the solution. Using electron microscopy, crocidolite fibers were counted after each puff.

The range of crocidolite asbestos structures released varied from 469 to 12,142 structures per cubic centimeter. The cigarettes that had not been manipulated before insertion into the syringe had lower asbestos concentrations, and the cigarette that took the longest time to place into the syringe barrel had the lowest asbestos concentration. Longo could not explain why one or two chrysotile asbestos fibers were found in the control cigarettes which did not contain crocidolite asbestos. The MAS1 study went through a peer-review process and was published in Cancer Research in June 1995 in an article entitled *Cross Asbestos Fibers in Smoke From Original Kent Cigarettes.*

In December 1993 and September 1994, after MAS1 was criticized because it did not utilize an automated smoking machine, Longo tested three additional Kent filter cigarettes from two different 40-year-old packs utilizing an automated smoking machine (MAS2). One cigarette was tested in December 1993 and two were tested in September 1994. The smoking machine, obtained from the American Health Foundation, a governmental agency, was originally designed to test for tar and nicotine, and was calibrated according to Federal Trade Commission protocols. The tested cigarette was left in the machine and smoked for eight puffs over an eight minute time span to a specified length. After the smoke was collected and tar and nicotine were filtered out, the resulting samples were analyzed by electron microscopy according to the same "EPA"[3] protocol used in MAS1. Like MAS1, MAS2 demonstrated that crocidolite asbestos was released from the original Kent cigarettes during smoking. Between 43.1 and 119.3 crocidolite asbestos structures per cubic centimeter were released.

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[3] Environmental Protection Agency.

Both MAS1 and MAS2 revealed a "large release of crocidolite asbestos."

Longo attributed the variation in asbestos quantities between the two MAS studies to (1) the possibility of reduced release in MAS2 due to a buildup of tar and nicotine in the automated smoking machine, or (2) the uneven distribution of asbestos in the Kent cigarettes themselves. Longo said it was unclear whether MAS1 or MAS2 was more representative of the quantity of asbestos released than that released through the actual smoking experience.

On cross-examination Longo stated he was unaware of where the cigarettes used in MAS1 or MAS2 had been or how they had been stored from the time of their manufacture until he obtained them from Slade. The cigarettes tested in MAS2 had been in open cigarette packs since 1991. Other than visually comparing the tested cigarettes with other 40-year-old cigarettes provided by Slade, Longo did nothing to determine whether they had changed over time. Some of the nonoriginal Kent cigarettes provided by Slade did appear to have changed over time, but the asbestos-containing original Kents were "perfect" when opened. Longo believed that MAS1 could be reproduced and similar results would be obtained.

Hammar testified that Longo's article in Cancer Research was sufficiently trustworthy to be relied on for the basis of his opinion that Kent cigarettes were the most likely source of the asbestos that caused Milton's mesothelioma. After discussions with another expert in asbestos analysis, Hammar concluded that the conclusions reached in Longo's article were scientifically valid. Hammar stated that Longo's laboratory had been approved by the government to conduct asbestos fiber analysis, and such approval was subject to "very high standards."

As to the *Kelly/Frye* issue raised by appellants on appeal, we preliminarily note that appellants did not specifically raise this issue before the trial court, either in their pretrial written

motion in limine to exclude evidence of the Longo experiments, or otherwise in their general foundational objection, as required by Evidence Code section 353, subdivision (a) if the issue is to be preserved for appeal. (See, e.g., *People* v. *Mattson* (1990) 50 Cal.3d 826, 853-854) "Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*Id.* at p. 854.) Respondents do not challenge appellants' failure to make a specific *Kelly/Frye* objection below, but instead contend *Kelly/Frye* does not apply because Longo "did not rely upon a sophisticated new scientific technique to demonstrate a novel conclusion." Although appellants appear not to have properly preserved the issue for appellate review, assuming they did, we see no error.

The admissibility of expert evidence regarding new scientific techniques is governed by *Kelly, supra,* 17 Cal.3d 24, which adopted the rule in *Frye, supra,* 293 F. 1013. (See also, *People* v. *Leahy* (1994) 8 Cal.4th 587.) First, "the reliability of the method must be established, usually by expert testimony." (*Kelly, supra,* 17 Cal.3d at p. 30, italics omitted.) Second, "the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject." (*Ibid.,* italics and citations omitted.) "Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." (*Ibid.,* citations omitted.) To be reliable the technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Ibid.,* italics omitted, quoting *Frye, supra,* 293 F. at p. 1014.)

The reliability of the method was established by both Longo and Hammar. Hammar's qualifications were never questioned. As to Longo's qualifications to render an opinion, he clearly qualified as an expert. In addition to being an engi-

neer and materials scientist, he is an electron microscopist and president of a laboratory specializing in asbestos analysis, and his laboratory was approved by the government to conduct asbestos fiber analysis. Appellants' contention that Longo was unqualified as an expert on cigarette smoke analysis because his experiments were funded by attorneys goes not to Longo's qualifications as an expert, but to the potential for bias. To state it another way, the funding factor does not affect the admissibility of the evidence, but its weight. Whether Longo's experiments were affected by bias due to their funding source is a question of fact for the jury, which was obviously resolved in favor of respondents.

With regard to whether correct scientific procedures were used, Longo testified that he restored the humidity to the 40-year-old cigarettes using a published protocol for rehydration. The MAS1 study was subject to a peer-review process and was published in a professional journal. The smoking machine utilized in MAS2 was obtained from a governmental agency and calibrated according to Federal Trade Commission protocols.

Hammar opined that Longo's article regarding MAS1 was sufficiently trustworthy to form the basis of his opinion that Kent cigarettes were the most likely source of the asbestos which caused Milton's mesothelioma. Hammar concluded that the conclusions reached in the article emanating from MAS1 were scientifically valid, and Longo's laboratory was subject to very high standards.

Appellants did not ask Longo or any other witness whether Longo's experimental techniques were generally accepted within the scientific community, nor did they introduce any evidence to the contrary. However, Hammar's testimony established this fact.

Consequently, assuming the *Kelly/Frye* issue was preserved for appeal, no error is demonstrated in the court's admission of

the Longo experiments. The testimony by Longo and Hammar provides substantial evidence that Longo's test methods were scientifically valid, including the sample size. In addition, based on testimony by Longo and Hammar, the court could reasonably find that the conditions of the MAS1 and MAS2 studies sufficiently replicated average human smoking. Whether the cigarettes degraded was a factual question for the jury, and there is substantial evidence that they did not.

III

Appellants contend the court erred in permitting Horn to testify regarding Milton's smoking history and the reliability of that history, because it was an erroneous use of a prior consistent statement. (Evid. Code, § 791.)[4]

Horn testified he saw Milton in December 1994 for evaluation of his mesothelioma which had been previously diagnosed. He took a routine smoking history and, because of Milton's mesothelioma, asked him what brand of cigarettes he had smoked. Prior to taking the history, Horn did not tell Milton that Kent cigarettes contained asbestos in their filters. Lorillard's counsel objected on grounds of relevance and hearsay to Horn's testimony as to the cigarette brands Milton re-

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[4] Evidence Code section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

ported having smoked. Respondents, counsel responded that the evidence "goes to [Horn's] ability to be able to rely on what he's being told by the ability of the reporter to give him information in a detailed fashion." The court ruled the evidence was admissible to the extent it formed the basis of Horn's opinion. Respondents' counsel again stated the evidence went to the credibility of the information provided to Horn upon which he relied. The court stated Horn could accept whatever Milton said as the truth. Horn then stated he accepted as truthful everything Milton told him regarding his medical, social and occupational history.

As Horn began to recite the brands of cigarettes Milton reported he had smoked, Lorillard's counsel again objected on hearsay grounds, and H&V's counsel objected: "What I think this is, is a classic example of offering a prior consistent statement before [Milton] has been rebutted. They want to put [Milton]'s statements in evidence before he's impeached by those statements, and I don't think that's proper." The court responded by directing respondents' counsel to limit questions to Horn's diagnosis and treatment. Horn then testified that Milton told him he began smoking Kent filter cigarettes in February 1952, and smoked about one pack per day until he stopped smoking in January 1963. Subsequently, respondents' counsel asked Horn whether the smoking history Milton provided was reliable. H&V's counsel objected on the ground that in essence, Horn was improperly being asked whether Milton was telling the truth. When respondents' counsel rejoined that was not the purpose of her question, the court stated, "You may ask. Overruled." Horn testified that the smoking history Milton provided was "very reliable."

Lorillard's "prior consistent statement" objection was misplaced. The prior consistent statement exception to the hearsay rule operates only where there is an attempt to introduce a prior statement of a witness that is consistent with his present

testimony (Evid. Code, §§ 791, 1236), and Milton had not yet testified. To the extent any objection was based on hearsay, a medical history taken from a patient by a physician and used to diagnose, treat or to support a professional opinion, is a recognized exception to the hearsay rule. (Evid. Code, § 801, subd. (b); *People* v. *Stoll* (1989) 49 Cal.3d 1136, 1155; *People* v. *Wilson* (1944) 25 Cal.2d 341, 348; *Johnson* v. *Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252.)

Horn's opinion that Milton's recitation of his medical history was reliable, was inadmissible. Although Horn could properly testify that he relied upon Milton's smoking history in rendering his diagnosis and treatment, and that Milton's condition and symptoms were consistent with the smoking history provided, Horn could not offer an opinion that Milton's smoking history was reliable, i.e, that it was truthful. (*Grimshaw* v. *Ford Motor Co.* (1981) 119 Cal.App.3d 757, 788-789 (*Grimshaw*).) In response to defense counsel's objection, respondents' attorney stated merely that she did not intend to elicit Milton's smoking history to establish its truth; she failed to state any ground to support Horn's opinion that Milton's smoking history was reliable. Respondents also fail to provide any justification in their appellate briefs.

However, we conclude the error was harmless, because the court properly instructed the jury on the use of this testimony. The jury was instructed that "Evidence has been received that the plaintiff made statements to a physician for the purpose of diagnosis or treatment. That evidence may not be considered as proof of the truth of the facts stated; you may consider it only to the extent it does show the information upon which the physician's opinions are based." This is a correct statement of the law. (*Grimshaw, supra,* 119 Cal.App.3d at pp. 788-789.) Horn's testimony notwithstanding, Milton's credibility was still an issue for the jury. In addition, substantial evidence of

Milton's smoking history came in through his own testimony and that of Shirley.

IV

Appellants next contend respondents' counsel committed misconduct during opening statement and closing argument by implying that the missing test reports regarding the Revere/Farr and Fullam studies were deliberately lost or destroyed by Lorillard, without producing evidence that written reports ever existed.

Respondents rejoin that appellants have waived this issue by failing to object *below*. (*Menasco* v. *Snyder* (1984) 157 Cal.App.3d 729, 733.) Appellants argue that no waiver occurred because during in limine motions prior to opening statements, they informed the court that there was no evidence any written reports ever existed, and therefore plaintiffs' counsel could not assert the implication that such reports disappeared. The court agreed and reminded plaintiffs' counsel that it had to establish that such reports existed.

"Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished." (*Horn* v. *Atchison T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610). In reviewing claims of misconduct, "[e]ach case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." (*Sabella* v. *Southern Pac. Co.* (1969) 70 Cal.2d 311, 320-321, footnote omitted.)

Here, respondents attempted to preclude any mention of missing test reports unless their existence had first been established by raising the issue in the in limine hearing. However, no objection or request for admonition was tendered immediately after the allegedly improper statements were made during opening statement or closing argument, and appellants have not demonstrated that an objection at the time the statements were made would have been futile or prejudicial. In such a situation, appellants cannot sit back and do nothing to cure the possible harm and then raise the issue on appeal. (*Arbaugh* v. *Procter & Gamble Mfg. Co.* (1978) 80 Cal. App.3d 500, 512.) Consequently, the claim of error is waived. (See *Brokopp* v. *Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860, 862.)

V

Lorillard next argues that the $560,000 punitive damage award against it as the successor corporation to P. Lorillard was improper. Alternatively, and for the first time on appeal, Lorillard argues that even if punitive damages were available against it, the court erred in applying California law, and should have applied New Jersey law, the state where P. Lorillard's misconduct occurred. Finally, they argue there is no substantial evidence of its wrongdoing to support an award of punitive damages, and consequently the punitive damage award violates the federal due process clause.

Between 1952 and 1956 P. Lorillard, a New Jersey corporation, manufactured and sold Kent cigarettes with asbestos-containing filters. In April 1968 P. Lorillard "merged with and into Lorillard Corporation," a Delaware corporation. In November 1968, Loews P.L. Company, Inc., a wholly-owned subsidiary of Loews Theaters, Inc., a New York corporation, merged with and into Lorillard Corporation. Upon consum-

mation of the merger Lorillard Corporation became a wholly-owned subsidiary of Loews Theaters, Inc. In July 1969, Lorillard Corporation merged with and into Loews Theaters, Inc. Thereafter, it operated as Lorillard, a division of Loews Theaters, Inc. In 1971 Loews Theaters, Inc., became a subsidiary of Loews Corporation and in August 1985, the name of Loews Theaters, Inc., was changed to Lorillard, Inc.

Lorillard argues that it was not until 12 years after P. Lorillard stopped producing asbestos-containing Kent cigarettes that Loews P.L. Company, Inc., "an entirely unaffiliated entity [] purchased Lorillard." Therefore, it contends, that instead of continuing P. Lorillard's business, any tortious conduct ceased by the time P. Lorillard's corporate form changed to Lorillard.

Corporations Code section 1107 provides: "(a) Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them."

In *Moe* v. *Transamerica Title Ins. Co.* (1971) 21 Cal. App.3d 289, Division Two of this court upheld an award of punitive damages against a successor corporation for the torts of its predecessor. *Moe* noted that punitive damages are a portion of tort liability, and that consolidation or merger "merely directs the blood of the old corporation into the veins of the new, the old living in the new," subjecting the successor to the predecessor's liability for punitive damages. (*Id.* at pp. 304, internal citations and quotation marks omitted.)

In *Marks* v. *Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429 (*Marks*), Division One of this court held that the acquisition of a manufacturer by a subsidiary of one of the defendants in a products liability action was a de facto merger, with all of the consequences of a statutory

merger under Corporations Code section 1107. Consequently, the successor was liable for its predecessor's liabilities, including the punitive damages awarded to the plaintiff. (*Marks* at p. 1438.)

Marks rejected the analytical approach and result *of In Re Related Asbestos Cases* (N.D. Cal. 1983) 566 F.Supp. 818, wherein the defendant, Celotex, was the successor to a series of corporations whose asbestos caused the injuries complained of, and it continued to operate a division called by the original corporation's name, Philip Carey. Throughout each transaction the assets were acquired subject to the former company's liabilities. However, the final purchase by Celotex was for cash rather than by exchange, and no former stockholders became stockholders of Celotex or of any of Celotex's parent or subsidiary corporations. The district court reasoned that Celotex was not a mere continuation of Carey, since it continued to operate with its former officers and directors after acquiring Carey, no Carey shareholders became Celotex shareholders, and no culpable officers of the predecessor corporations were retained. Thus, the court held there was insufficient similarity between Carey and Celotex to warrant imposition of punitive damages. (*Id.* at pp. 821-824.)

Marks rejected the *In re Related Asbestos Cases* approach on the ground that it is the *form* of the acquisition that determines whether or not corporate liabilities are passed on to a successor corporation, not the corporate similarity or the continuity of the predecessor's product line. (*Marks, supra,* 187 Cal.App.3d at p. 1435.)

Here, the sparse evidence is that P. Lorillard merged with Lorillard, which continued its business throughout several successive changes in corporate form. We must presume in support of the judgment that the merger was a statutory merger under Corporations Code section 1107. (See *Walling* v. *Kimball* (1941) 17 Cal.2d 364, 373 [all presumptions indulged to

support judgment as to matters as to which record is silent]; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 348, pp. 394-396.) Based on the facts before us, we see no reason to depart from the reasoning or result in *Marks*. In addition, Lorillard has waived the choice of law issue by raising it for the first time on appeal. (*Burden* v. *Snowden* (1992) 2 Cal.4th 556, 570 (*Burden*).)

Finally, the punitive damage award against Lorillard does not violate due process because as we discuss, *infra*, there is substantial evidence of Lorillard's wrongdoing to support the punitive damage award.

VI

Lorillard contends there was no substantial evidence to support the imposition of punitive damages against it because there was no evidence that P. Lorillard or anyone else was aware that use of asbestos in Kent cigarettes would probably have dangerous consequences.

Punitive damages are appropriate if "the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code, § 3294, subd. (a).) As used in Civil Code section 3294 "'[m]alice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(1) & (2).)

A conscious disregard for the safety of others may constitute malice if the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and de-

liberately failed to avoid such consequences. (*Hasson* v. *Ford Motor Co.* (1982) 32 Cal.3d 388, 402.)

In resolving attacks on the sufficiency of the evidence, the test is whether a review of the entire record shows substantial evidence to support the verdict or judgment, and "when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" (*Bowers* v. *Bernards* (1984) 150 Cal.App.3d 870, 874, original italics.)

We conclude substantial evidence supports the punitive damage award against Lorillard. In 1954 P. Lorillard knew that asbestos was emitted from its Kent cigarettes during the human smoking process, and told Fullam that it was anxious to have its cigarette smoke free of asbestos fiber, "as free or as pure as the air which we normally breathe." In 1954, P. Lorillard coordinated with Drs. Morris Fishbein and Samuel Pearlman, to give "physician's gift box[es]" of Kent cigarettes to a group of Chicago doctors. One such doctor, Jerome M. Silver, M.D., wrote to Pearlman in May 1954 stating, "The other concern I have had is the effect of the asbestos which is used in the filter. There have been unofficial reports of cases of asbestosis found in people smoking Kents and said to be solely a result of such smoking. [¶] . . . [¶] I feel that as an individual, 'Kent' served my purpose, but I would like to see a scientific investigation of the effects of the asbestos contained in the filter."

Respondents' health research expert, Nicholson, testified that in the 1930's and 1940's the connection between asbestos exposure and cancer, particularly lung cancer, was demonstrated. In the 1950's there was widespread knowledge that asbestosis was related to asbestos exposure. Consequently, by

the 1950's a manufacturer of asbestos-containing products would have been aware of medical literature containing asbestos and cancer.

Finally, in his deposition, Elise Comproni testified that between 1952 and 1954, while employed by the Commonwealth of Massachusetts Department of Public Health involved in air sampling and ventilation control, he made several visits to H&V's plant to evaluate potential health hazards. At that time asbestosis and lung cancer were known effects of exposure to asbestos, and Comproni discussed such hazards with H&V's plant manager and foreman. At that time Comproni was "appalled" that asbestos was being used in cigarette filters because "asbestos is a known carcinogen causing asbestosis and lung cancer and to put it in a product that you are actually breathing air from is not in keeping with the best health practices."

The February 1952 agreement between P. Lorillard and H&V states their "desire to exploit the joint ownership of the processes and/or of the inventions" and utilize their "mutual 'know-how'" regarding development and production of an asbestos-containing filter cigarette. The agreement defines "mutual 'know-how,'" as "all information and data, knowledge and technique of every kind and description in each party's possession, or acquired by it during the term of this agreement." Thus, pursuant to the agreement it may be reasonably inferred that Lorillard knew or should have known whatever H&V knew or should have known as to the health affects of its asbestos-containing filter cigarettes.

Such evidence is sufficient to show that in the 1950's P. Lorillard knew or should have known that smoking asbestos-containing filter cigarettes could result in irreversible and fatal asbestos-related illness.

VII

H&V contends the court erred in submitting respondents' fraud claim against it to the jury, because the first amended complaint did not allege fraud against it, respondents did not amend their complaint to do so, and not until the parties rested did respondents indicate an intent to allege fraud against it.

The seventh cause of action entitled "FRAUD," and alleged solely against Lorillard states, in relevant part, that despite its knowledge that crocidolite asbestos fibers were a "respiratory hazard," Lorillard produced asbestos-containing Kent filter cigarettes and (1) misrepresented to [Milton], the public and the medical profession that its Kent cigarettes were safe, merchantable and fit for their intended use; (2) induced the public to smoke its cigarettes based upon the health, safety and protection afforded by the filter's design; and (3) encouraged the medical profession, through advertisements and demonstrations at medical conventions, to recommend Kent cigarettes based upon the health, safety and protection due to the filter's design. It also alleged that Milton detrimentally relied on Lorillard's advertisements in changing his brand of cigarettes to Kent in 1952 and in remaining "brand-loyal" to Kent cigarettes until approximately 1962.

The fifth cause of action entitled "PUNITIVE DAMAGES," alleged against both Lorillard and H&V, incorporates by reference the seventh cause of action. In addition, it alleges that appellants researched, tested, manufactured, and marketed their asbestos-containing products in conscious disregard for the safety of the product's users, given appellants' "specific prior knowledge that there was a high risk of injury or death resulting from exposure to asbestos or asbestos products, including but not limited to, lung cancer and other forms of cancer, and asbestosis." It also alleges that appellants intentionally failed to reveal their knowledge of the high risk of injury or

death resulting from exposure to asbestos and asbestos products, and "consciously and actively concealed and suppressed said knowledge" from members of the general public. Finally, it alleges that appellants' conduct was "willful, malicious, outrageous, and in conscious disregard and indifferent" to the health and safety of persons, including respondents.

The court properly instructed the jury on intentional misrepresentation, negligent misrepresentation and fraudulent concealment, and also that unless otherwise stated, the instructions given applied to each defendant. More than half of the twenty-four special verdict questions pertained to elements of fraud and the jury found fraud as to both Lorillard and H&V. The jury specifically found that: (1) H&V made a representation as to a past or existing material fact; (2) the representation was false; (3) H&V made the representation recklessly without knowing whether it was true or false, and without any reasonable grounds for believing it to be true; (4) H&V made the representation with an intent to defraud Milton; and (5) H&V intentionally concealed or suppressed a material fact with the intent to defraud Milton. The jury also found that Milton detrimentally relied on H&V's representation, would have acted in a different manner had he known of the concealed or suppressed fact, and was damaged due to H&V's misrepresentation and concealment or suppression of the material fact. The jury answered "Yes" after the name H&V to the question: "Do you find by clear and convincing evidence that any defendant was guilty of malice, oppression or fraud in the conduct on which you base your finding of liability?"

A complaint is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties and requests that the rights and duties of the parties be adjudged by the court. (*Minor* v. *Municipal Court* (1990) 219 Cal.App.3d 1541, 1548.) The incor-

poration by reference in a cause of action of factual allegations contained in another cause of action is permissible. (See *Signal Hill Aviation Co.* v. *Stroppe* (1979) 96 Cal.App.3d 627, 638-639.)

The elements of fraud which give rise to the tort action for deceit are (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Khan* v. *Shiley Inc.* (1990) 217 Cal.App.3d 848, 857-858.) To establish a cause of action for fraud, a plaintiff must plead and prove, factually and specifically, all of the elements of the cause of action. (*Conrad* v. *Bank of America* (1996) 45 Cal.App.4th 133, 156.)

We conclude the complaint sufficiently pleads a cause of action for fraud against H&V. At the very least, the complaint alleges that H&V intentionally concealed its knowledge of the, high risk of injury or death resulting from exposure to asbestos and asbestos products, and "consciously and actively concealed and suppressed said knowledge" from members of the general public.

VIII

H&V argues there is no substantial evidence to support the award of punitive damages against it.

Knudson, H&V's technical director and holder of the Kent Micronite filter patent, testified in his deposition that in the 1952 to 1954 period he was aware that inhalation of asbestos dust was "not desirable," and involved some risk. At the time he was "only vaguely" familiar with the term "asbestosis," but knew it resulted from inhalation of asbestos dust.

A December 1954 letter from Knudson to P. Lorillard's Parmele noted receipt of two letters "pertaining to the problem of anchoring the asbestos in the present micronite furnish." Knudson also noted his awareness of Fullam's findings.

As previously noted, Comproni told H&V that asbestos was harmful, and was appalled that it was being used in cigarettes. Finally, as we previously stated, the February 1952 agreement between P. Lorillard and H&V reasonably permits the inference that H&V may be charged with whatever knowledge Lorillard possessed regarding the health risks associated with inhalation of asbestos. Taken together the foregoing constitutes substantial evidence that H&V acted with malice, oppression and/or fraud sufficient to support the punitive damage award.

IX

H&V argues that respondents "should not have been allowed to meet their burden of proving causation solely by reference to a bare statistical inference." It argues that proof of causation was based solely on impermissible statistical inference and not on reliable scientific evidence that the level of Milton's claimed exposure to asbestos by smoking Kent cigarettes was sufficient to cause his mesothelioma.

Respondents properly rejoin that H&V has waived this issue on appeal by failing to object below to respondents' experts' opinions on the ground they were based on improper statistical inferences. (Evid. Code, § 353; *Burden, supra,* 2 Cal.4th at p. 570.) In addition, there is substantial evidence to support the jury's finding that Milton's mesothelioma resulted from his exposure to asbestos through smoking Kent cigarettes. "In a personal injury action, causation must be proven within a reasonable medical probability based on expert testimony; a mere possibility is insufficient. [Citation.] A possible cause becomes 'probable' when, in the absence of other reasonable causal explanations, it is more likely than not the injury resulted from its action. [Citation.]" (*Sparks* v. *Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 476.)

In this case respondents' experts testified that Milton's exposure to the crocidolite asbestos-containing Kent cigarettes was the most intense exposure in his lifetime and was sufficient to cause his mesothelioma. The jury obviously found that Milton's exposures to asbestos other than that contained in the Kent cigarettes were not legal causes of his injury.

X

The jury awarded Milton $700,000 in noneconomic damages defined by the court as "subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering [and] emotional distress . . . ." Appellants contend that Milton's death during the pendency of this appeal requires reversal of his noneconomic damage award pursuant to Code of Civil Procedure section 377.34 which provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and *do not include damages for pain, suffering, or disfigurement.*" (Italics added.)

This issue has been resolved adversely to appellants by the Supreme Court's recent decision in *Sullivan* v. *Delta Air Lines, Inc.* (1997) 15 Cal.4th 288.

DISPOSITION

The judgment is affirmed. Costs to respondents.

HANING, J.

We concur.

PETERSON, P.J.

JONES, J.

APPENDIX B.

First Appellate District, Division Five, No. A072695
S064550

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
NOV 12 1997
Robert Wandruff Clerk
DEPUTY

MILTON HOROWITZ Et Al . , Respondents

v.

LORILLARD INCORPORATED Et Al . , Appellants

Appellants' petition for review DENIED.

Chin, J., is of the opinion the petition should be granted.

GEORGE

Chief Justice

APPENDIX C.

FILED
San Francisco County Superior Court
NOV 17 1994
ALAN CARLSON, Clerk
By: /s/
Deputy Clerk

HARRY F. WARTNICK (Bar No. 54761)
MADELYN J. CHABER (Bar No. 88950)
STEVEN M. HAROWITZ (Bar No. 71117)
AUDREY A. SMITH (Bar No. 118411)
NIROMI L. WIJEWANTHA (Bar No. 154216)
CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY,
WARTNICK, MOORE, & HARRIS, INC.
101 California Street, 26th Floor
San Francisco, CA 94111
(415) 433-0440

Attorneys for Plaintiffs

PLAN 11 1:30 P.M.
STATUS CONFERENCE DATE: APR 24 1996

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ,	) No. 965245
Plaintiffs, vs.	)
RAYBESTOS-MANHATTAN, INC.	) COMPLAINT FOR DAMAGES

OWENS-CORNING FIBERGLAS CORPORATION; ACANDS, INC.; AMERICAN ASBESTOS COMPANY; ANCHOR PACKING COMPANY; ARMSTRONG CORK COMPANY; ASARCO, INC.; BABOCK & WILCOX; COMBUSTION ENGINEERING COMPANY; M. H. DIETRICK COMPANY; DOUGLASS INSULATION CO., INC.; THE E. J. BARTELLS COMPANY; FLEXITALLIC, INC., THE FLINTKOTE COMPANY; FOSTER WHEELER BOILER CORPORATION; FOSTER WHEELER CORPORTION; FOSTER WHEELER ENERGY CORPORATION; FOSTER WHEELER USA CORPORATION; GAF CORPORATION GARLOCK, INC.; W. R. GRACE & CO.—CONN.; HAMILTON MATERIALS, INC.; KAISER CEMENT CORPORATION; KAISER GYPSUM CO., INC.; KEENE; CORPORATION; METALCLAD INSULATION CORPORATION; NATIONAL GYPSUM COMPANY; OWENS-ILLINOIS CORPORATION; PFIZER, INC.; PITTSBURG CORNING CORPORATION; PLANT INSULATION COMPANY; QUIGLEY COMPANY, INC.; QUINTEC INDUSTRIES, INC.; RAPID AMERICAN CORP., as Successor in Interest to PHILIP	) (Negligence, Strict Liability, Enterprise Liability, False Representation, [Restatement Section 402-B], Loss of Consortium, Punitive Damages)))))))))))))))))) (Asbestos))))))

CAREY MANUFACTURING CORP.,)
RAPID AMERICAN CORP., as)
Successor in Interest to PANACON)
CORP.; RAPID AMERICAN CORP.,)
as Successor in Interest to PHILIP)
CAREY CORP.; RAPID AMERICAN)
CORP., as Successor in Interest to)
CAREY CANADA, INC.; RICH-TEX,)
INC.; RILEY STOKER CORPORA-)
TION; SACOMO MANUFACTUR-)
ING COMPANY; SACOMO SIERRA,)
INC.; SELBY BATTERSBY & COM-)
PANY; SYD CARPENTER, MARINE)
CONTRACTOR, INC.; THORPE)
INSULATION COMPANY; J T)
THORPE, INC.; TRIPLE A MACHINE)
SHOP, INC.; U. S. MINERAL)
PRODUCTS COMPANY; UNI-)
ROYAL, INC.; UNITED STATES)
GYPSUM COMPANY; WALDRON)
DUFFY; WESTERN MacARTHUR)
COMPANY; and FIRST DOE through)
THREE HUNDREDTH DOE,)
inclusive,)
)
Defendants.)
_____)

FIRST CAUSE OF ACTION-NEGLIGENCE
(Personal Injuries)

PLAINTIFF MILTON J. HOROWITZ COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND FOR A

CAUSE OF ACTION FOR NEGLIGENCE (PERSONAL INJURIES) ALLEGES:

1. The true names and capacities, whether individual, corporate, associate, governmental or otherwise, of defendants FIRST DOE through THREE HUNDREDTH DOE, inclusive, are unknown to plaintiff at this time, who therefore sues said defendants by such fictitious names. When the true names and capacities of said defendants have been ascertained, plaintiff will amend this Complaint accordingly. Plaintiff is informed and believes and thereon alleges that each defendant designated herein as a DOE is responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and caused injuries and damages proximately thereby to the plaintiff, as hereinafter alleged.

2. At all times herein mentioned, each of the defendants was the agent, servant, employee and/or joint venturer of his co-defendants, and each of them, and at all said times, each defendant was acting in the full course and scope of said agency, service, employment and/or joint venture.

3. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, defendants RAYBESTOS-MANHATTAN, INC.; OWENS-CORNING FIBERGLAS CORPORATION; ACANDS, INC.; AMERICAN ASBESTOS COMPANY; ANCHOR PACKING COMPANY; ARMSTRONG CORK COMPANY; ASARCO, INC.; BABCOCK & WILCOX; COMBUSTION ENGINEERING, INC.; CONSOLIDATED INSULATION, INC.; CROWN, CORK AND SEAL; DEE ENGINEERING COMPANY; M. H. DIETRICK COMPANY; DOUGLASS INSULATION CO., INC.; THE E. J. BARTELLS COMPANY; FLEXITALLIC, INC.; THE FLINTKOTE COMPANY; FOSTER WHEELER BOILER CORPORATION; FOSTER WHEELER CORPORATION; FOSTER WHEELER ENERGY CORPORATION; FOSTER

WHEELER USA CORPORATION; GAF CORPORATION; GARLOCK, INC.; W. R. GRACE & CO.-- CONN.; HAMILTON MATERIALS, INC.; KAISER CEMENT CORPORATION; KAISER GYPSUM CO., INC.; KEENE CORPORATION; METALCLAD INSULATION CORPORATION; NATIONAL GYPSUM COMPANY; OWENS-ILLINOIS CORPORATION; PFIZER, INC., PITTSBURG CORNING CORPORATION; PLANT INSULATION COMPANY; QUIGLEY COMPANY, INC.; QUINTEC INDUSTRIES, INC.; RAPID AMERICAN CORP., as Successor in Interest to PHILIP CAREY MANUFACTURING CORP.; RAPID AMERICAN CORP., as Successor in Interest to PANACON CORP.; RAPID AMERICAN CORP., as Successor in Interest to PHILIP CAREY CORP.; RAPID AMERICAN CORP., as Successor in Interest to CAREY CANADA, INC.; RICHTEX, INC.; RILEY STOKER CORPORATION; SACOMO MANUFACTURING COMPANY; SACOMO SIERRA, INC.; SELBY, BATTERSBY & COMPANY; SYD CARPENTER, MARINE CONTRACTOR, INC.; THORPE INSULATION COMPANY; J T THORPE, INC.; TRIPLE A MACHINE SHOP, INC.; U. S. MINERAL PRODUCTS COMPANY; UNIROYAL, INC.; UNITED STATES GYPSUM COMPANY; WALDRON DUFFY; WESTERN MacARTHUR COMPANY; and FIRST DOE through THREE HUNDREDTH DOE, inclusive, are corporations organized and existing under and by virtue of the laws of the State of California, or the laws of some state or foreign jurisdiction, and that said defendants were and are authorized to do and are doing business in the State of California, and that said defendants have regularly conducted business in the City and County of San Francisco, State of California.

4. Plaintiffs are informed and believes, and thereon alleges, that defendant WESTERN MAC ARTHUR is the successor in interest to, or otherwise liable for the acts or omissions of

WESTERN ASBESTOS COMPANY and BAY CITIES ASBESTOS COMPANY; that PITTSBURG CORNING CORPORATION is the successor in interest or otherwise liable for the acts or omissions of UNION ASBESTOS AND RUBBER COMPANY and/or UNARCO; that defendant QUINTEC INDUSTRIES, INC. is the successor in interest or otherwise liable for the acts or omissions of WESTERN FIBERGLAS SUPPLY COMPANY, WESTERN FIBROUS GLASS PRODUCTS COMPANY and/or WESGLAS; that defendant RAPID AMERICAN CORPORATION is the successor in interest or otherwise liable for the acts or omissions of PHILIP CAREY MANUFACTURING CORP., PANACON CORP., PHILIP CAREY CORP., and/or CAREY CANADA, INC.; that PLANT INSULATION COMPANY is the successor in interest or otherwise liable for the acts or omissions of PLANT ASBESTOS COMPANY and ASBESTOS COMPANY OF CALIFORNIA; and that each of the remaining defendants is liable for the acts and omissions of its predecessor entities.

5. At all times herein mentioned, defendants, and each of them were engaged in the business of manufacturing, fabricating, designing, assembling, distributing, leasing, buying, selling, inspecting, servicing, repairing, marketing, warranting and advertising a certain substance, the generic name of which is asbestos, and other products containing said substance.

6. At all times herein mentioned, defendants, and each of them, singularly and jointly, negligently and carelessly researched, tested or failed to test, warned or failed to warn, manufactured, designed, developed, distributed, labeled, advertised, marketed, warranted, inspected, repaired, fabricated, modified, serviced, and sold a certain substance, the generic name of which is asbestos, and other products containing said substance, in that said substance was capable of causing and did, in fact, proximately cause personal injuries to users, consumers, workers and others, while being used in a manner rea-

sonably foreseeable, thereby rendering said substances unsafe and dangerous for use by the consumers, users, bystanders or workers exposed thereto.

7. Plaintiff herein is a worker who for a substantial length of time used, handled or been otherwise exposed to the asbestos and asbestos products referred to in paragraph 6, in a manner that was reasonably foreseeable.

8. As a direct and proximate result of the conduct of the defendants, and each of them, as aforesaid, the exposure to asbestos caused severe and permanent injury to the plaintiff, including, but not limited to, asbestosis, other lung damage, and cancer.

9. Plaintiff is informed and believes, and thereon alleges, that asbestosis is a progressive lung disease caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos products over a period of time.

10. Plaintiff presently believes that he suffers from a condition known as asbestosis or other diseases including cancer related to the exposure to asbestos. Plaintiff was not aware that exposure to asbestos presented any risk of injury and/or disease to him, and had not been advised or informed by anyone that he could contact indeed did contact any disease, sickness or injury as a result of working in the vicinity of asbestos.

11. As a direct and proximate result of the aforesaid conduct of defendants, and each of them, plaintiff is dying and has suffered, and continues to suffer permanent injuries to his person, body and health, including but not limited to asbestosis, other lung damage, and cancer, all to his general damages in a sum in excess of the jurisdictional limits of the Municipal Court.

12. As a direct and proximate result of the aforesaid conduct of the defendants, and each of them, plaintiff has incurred, is presently incurring and will incur in the future, li-

ability for physicians, surgeons, nurses, hospital care, medicine, hospitals, x-rays and other medical treatment, the true and exact amount thereof being unknown to plaintiff at this time, and plaintiff prays leave to amend this Complaint accordingly when the true and exact cost thereof is ascertained.

13. Plaintiff MILTON J. HOROWITZ has lost prejudgment interest pursuant to Civil Code Section 3288, the exact amount of which plaintiff prays leave to insert herein when finally ascertained.

14. As a further direct and proximate result of the said conduct of defendants, and each of them, plaintiff has incurred, and will incur, loss of income, wages, profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to plaintiff; and leave is requested to amend this Complaint to conform to proof at the time of trial.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as hereafter set forth.

SECOND CAUSE OF ACTION-STRICT LIABILITY

AS AND FOR A SECOND, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR STRICT LIABILITY, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

15. Plaintiff incorporates herein by reference as though fully set forth herein, paragraphs.1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of the FIRST CAUSE OF ACTION herein.

16. Defendants and each of them, researched, manufactured, tested or failed to test, warned or failed to warn, designed, labeled, distributed, advertised, marketed, warranted, inspected, repaired, offered for sale and sold a certain substance, the generic name of which is asbestos and other products containing said substance, which substance is defective,

in that same was capable of causing and did, in fact, cause personal injuiries, including asbestosis, other lung damage and cancer, to the users and consumers thereof while being used in a reasonably forseeable manner, thereby rendering the same unsafe and dangerous for use by consumers, users, bystanders and workers exposed thereto; said defendants, and each of them, further failed to adequately warn of the risks to which plaintiff and others similarly situated were exposed.

17. As a direct and proximate result thereof, plaintiff has suffered the injuries and damages previously alleged.

THIRD CAUSE OF ACTION - ENTERPISE LIABILITY

AS AND FOR A THIRD, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR ENTERPRISE LIABILITY, PLAINTIFFS COMPLAIN OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

18. Plaintiffs incorporate by reference as though fully set forth herein, each of the paragraphs of the First and Second Causes of Action herein.

19. In the event plaintiffs are unable to identify the specific defendants which supplied the asbestos or asbestos-containing products which caused the damage referred to above, plaintiff alleges that as between an innocent plaintiff and culpable defendants, the latter should bear the cost of injury.

20. Plaintiff was exposed to asbestos and asbestos emanating from asbestos-containing products which are and were fungible in appearance as well as in composition and which were used in substantially the same manner by plaintiff and/or those working in the vicinity of plaintiff. Moreover, through no fault of the plaintiff, this asbestos and/or these asbestos-containing products cannot be traced to a specific producer.

21. In this action, plaintiff has joined a substantial share of the producers of such asbestos and/or asbestos-containing

products which caused the injuries complained of herein, and will prove at the time of trial the respective market share of each defendant within this action. Accordingly, liability attaches to each named defendant to the extent of their percentage of market share, in a manner consistent with the rules set forth in the decision of Sindell v. Abbott Laboratories, et al.

22. As a direct and legal result thereof, plaintiff has suffered the injuries and damages previously alleged.

WHEREFORE, plaintiffs pray judgment against the defendants, and each of them, as hereinafter set forth.

FOURTH CAUSE OF ACTION - FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS Sec. 402-B

AS AND FOR A FURTHER, FOURTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS SECTION 402-B, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

23. Plaintiff incorporates by reference the entire Second Cause of Action of this Complaint.

24. At the aforementioned time when defendants, and each of them, researched, manufactured, tested or failed to test, warned or failed to warn, designed, labeled, distributed, advertised, marketed, warranted, inspected, repaired, offered for sale and sold the said asbestos and asbestos-containing products, as hereinabove set forth, the defendants, and each of them, expressly and impliedly represented to members of the general public, including the purchases and users, of said product, and including the plaintiff herein and his employers, that asbestos and asbestos-containing products were of mer-

chantable quality, and safe for the use for which they were intended.

25. The purchasers and users of said asbestos and asbestos-containing products, including the plaintiff and his employers, relied upon said representations of defendants and each of them, in the selection, purchase and use of asbestos and asbestos-containing products.

26. Said representations by defendants, and each of them, were false and untrue, in that the asbestos and asbestos-containing products were not safe for their intended use, nor were they of merchantable quality as represented by defendants, and each of them, in that asbestos and asbestos containing products have very dangerous properties and defects whereby said products cause asbestosis, other lung disabilities and cancer, and have other defects that cause injury and damage to the users of said products, including the plaintiff herein, thereby threatening the health and life of plaintiff.

27. As a direct and proximate-result of said false representations by defendants and each of them, the plaintiff sustained the injuries and damages hereinabove set forth.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FIFTH CAUSE OF ACTION - PUNITIVE DAMAGES

AS AND FOR A FURTHER, FIFTH, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR PUNITIVE DAMAGES, PLAINTIFF COMPLAINS OF DEFENDANTS, RAYBESTOS MANHATTAN, INC., PITTSBURG CORNING CORPORATION, KEENE CORPORATION, OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, ARMSTRONG CORK COMPANY, GARLOCK, INC., W.R. GRACE & COMPANY, WESTERN MACARTHUR COMPANY, RAPID

AMERICAN CORP. as successor in interest to PHILIP CAREY MANUFACTURING CORP., PANACON CORP., PHILIP CAREY CORP., and/or CAREY CANADA, INC., AND FIRST DOE THROUGH FIFTIETH DOE, INCLUSIVE, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

28. Plaintiff incorporates by reference herein each and every paragraph of the First, Second, Third and Fourth Causes of Action of this complaint, and makes them a part of this, the Fifth Cause of Action, as though fully set forth herein.

29. In researching, testing, manufacturing, distributing, labeling, and marketing asbestos and asbestos products, defendants in this cause of action named, and each of them, did so with conscious disregard for the safety of the users of said asbestos and asbestos products, in that defendants had specific prior knowledge that there was a high risk of injury or death resulting from exposure to asbestos or asbestos product, including but not limited to, lung cancer and other forms of cancer, and asbestosis. Said knowledge was obtained, in part, from scientific studies and medical data to which defendants had access, as well as scientific studies performed by, at the request of, or with the assistance of, said defendants, and which knowledge was obtained by said defendants on or before 1933, and thereafter.

30. On or before 1933, and thereafter, said defendants were aware that users of asbestos and asbestos products, as well as members of the general public who would be exposed to asbestos and asbestos products, had no knowledge or information indicating that asbestos could cause injury, and said defendants knew that the users of asbestos and asbestos products, as well as members of the general public who were exposed to asbestos and asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos products was

safe, when in fact said exposure was extremely hazardous to human life.

31. With said knowledge, said defendants opted to manufacture and distribute said asbestos and asbestos products without attempting to protect users from or warn users of, the high risk of injury or death resulting from exposure to asbestos and asbestos products. Rather than attempting to protect users and workers from, or warn workers and users of, the high risk of injury or death resulting from exposure to asbestos and asbestos products, defendants intentionally failed to reveal their knowledge of said risk, and consciously and actively concealed and suppressed said knowledge from members of the general public that asbestos and asbestos products were safe for all reasonably foreseeable use, with the knowledge of the falsity of said implied representations.

32. The above referenced conduct of said defendants was motivated by the financial interst of said defendants in the continuing, uninterrupted distribution and marketing of asbestos-and asbestos products. In pursuance of said financial motivation, said defendants consciously disregarded the safety of the users of, and persons exposed to, asbestos and asbestos products, and were in fact, consciously willing to permit asbestos and asbestos products to cause injury to workers and users thereof, and persons exposed thereto, including plaintiff.

33. As the above referenced conduct of said defendants was and is willful, malicious, outrageous, and in conscious disregard and indifferent to the safety and health of workers exposed to asbestos and asbestos products, including plaintiff, plaintiff, for the sake of example, and by way of punishing said defendants, seeks punitive damages according to proof.

SIXTH CAUSE OF ACTION - LOSS OF CONSORTIUM

AS AND FOR A FURTHER, SIXTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR LOSS OF CONSORTIUM, PLAINTIFF SHIRLEY HOROWITZ COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

34. Plaintiff SHIRLEY HOROWITZ incorporates herein by reference and makes a part hereof as though fully set forth herein, Paragraphs 1 through 33 of this Complaint.

35. Plaintiff SHIRLEY HOROWITZ is now, and at all times herein mentioned was, the lawfully wedded spouse of MILTON J. HOROWITZ.

36. As a direct and proximate result of the acts of defendants, and each of them, as set forth and incorporated herein by reference, and the severe injuries caused thereby to MILTON J. HOROWITZ, as alleged in his Complaint, plaintiff SHIRLEY HOROWITZ has suffered, and for a long period of time will continue to suffer loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love and affection of her said spouse, and has suffered severe mental and emotional distress and general nervousness as a result thereof.

37. Plaintiff SHIRLEY HOROWITZ, as a result of the foregoing described injuries to her said spouse, has been generally damaged in a sum in excess of the jurisdictional limits of the Municipal Court.

WHEREFORE, plaintiffs MILTON J. HOROWITZ and SHIRLEY HOROWITZ pray judgment against defendants and each of them as follows:

1. For plaintiffs' general damages according to proof;

2. For plaintiff MILTON J. HOROWITZ's loss of income, wages and earning potential according to proof;

3. For plaintiff MILTON J. HOROWITZ's medical and related expenses according to proof;

4. For plaintiffs' prejudgment interest according to proof, pursuant to Civil Code section 3288;

5. For plaintiffs' cost of suit herein;

6. As to those defendants named in the Fifth Cause of Action, for exemplary or punitive damages according to proof; and

7. For such other and further relief as the Court deems just and proper.

Dated: November 16, 1994

CARTWRIGHT, SLOBODIN, BOKELMAN
BOROWSKY, WARTNICK, MOORE,
& HARRIS, INC.

By

---Harry F. Wartnick---
HARRY F. WARTNICK
Attorneys for Plaintiffs

APPENDIX D.

ENDORSED
FILED
San Francisco County Superior Court
DEC 29 1994
ALAN M. CARLSON, Clerk
By: /s/
RIC C. ZARAGOSA
Deputy Clerk

HARRY F. WARTNICK (Bar No. 54761)
MADELYN J. CHABER (Bar No. 88950)
STEVEN M. HAROWITZ (Bar No. 71117)
AUDREY A. SMITH (Bar No. 118411)
NIROMI L. WIJEWANTHA (Bar No. 154216)
CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY,
WARTNICK, MOORE, & HARRIS, INC.
101 California Street, 26th Floor
San Francisco, CA 94111
(415) 433-0440

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ,	)
	) No. 965245
Plaintiffs,	)
vs.	) FIRST AMENDED
	) COMPLAINT FOR
RAYBESTOS-MANHATTAN, INC.	) DAMAGES

OWENS-CORNING FIBERGLAS	) _
CORPORATION; ACANDS, INC.;	) (Negligence,
AMERICAN ASBESTOS COMPANY;	) Strict Liability,
ANCHOR PACKING COMPANY;	) Enterprise
ARMSTRONG CORK COMPANY;	) Liability, False
ASARCO, INC.; BABOCK &	) Representation,
WILCOX; COMBUSTION ENGIN-	) [Restatement
EERING COMPANY; M. H.	) Section 402-B],
DIETRICK COMPANY; DOUGLASS	) Fraud, Loss of
INSULATION CO., INC.; THE E. J.	) Consortium,
BARTELLS COMPANY; FLEXI-	) Punitive Damages
TALLIC, INC., THE FLINTKOTE	)
COMPANY; FOSTER WHEELER	)
BOILER CORPORATION; FOSTER	)
WHEELER CORPORTION; FOSTER	)
WHEELER ENERGY CORPORA-	)
TION; FOSTER WHEELER USA	)
CORPORATION; GAF CORPORA-	)
TION GARLOCK, INC.; W. R.	)
GRACE & CO.—CONN.; HAMIL-	)
TON MATERIALS, INC.; KAISER	)
CEMENT CORPORATION; KAISER	)
GYPSUM CO., INC.; KEENE;	)
CORPORATION; METALCLAD	)
INSULATION CORPORATION;	)
NATIONAL GYPSUM COMPANY;	)
OWENS-ILLINOIS CORPORATION;	)
PFIZER, INC.; PITTSBURG CORN-	) (Asbestos)
ING CORPORATION; PLANT	)
INSULATION COMPANY;	)
QUIGLEY COMPANY, INC.;	)
QUINTEC INDUSTRIES, INC.;	)
RAPID AMERICAN CORP., as	)
Successor in Interest to PHILIP	)

CAREY MANUFACTURING CORP.,)
RAPID AMERICAN CORP., as)
Successor in Interest to PANACON)
CORP.; RAPID AMERICAN CORP.,)
as Successor in Interest to PHILIP)
CAREY CORP.; RAPID AMERICAN)
CORP., as Successor in Interest to)
CAREY CANADA, INC.; RICH-TEX,)
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TION; SACOMO MANUFACTUR-)
ING COMPANY; SACOMO SIERRA,)
INC.; SELBY BATTERSBY & COM-)
PANY; SYD CARPENTER, MARINE)
CONTRACTOR, INC.; THORPE)
INSULATION COMPANY; J T)
THORPE, INC.; TRIPLE A MACHINE)
SHOP, INC.; U. S. MINERAL)
PRODUCTS COMPANY; UNI-)
ROYAL, INC.; UNITED STATES)
GYPSUM COMPANY; WALDRON)
DUFFY; WESTERN MacARTHUR)
COMPANY; and FIRST DOE through)
THREE HUNDREDTH DOE,)
inclusive,)
)
Defendants.)
_____)

FIRST CAUSE OF ACTION-NEGLIGENCE
(Personal Injuries)

PLAINTIFF MILTON J. HOROWITZ COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND FOR A

CAUSE OF ACTION FOR NEGLIGENCE (PERSONAL INJURIES) ALLEGES:

1. The true names and capacities, whether individual, corporate, associate, governmental or otherwise, of defendants FIRST DOE through THREE HUNDREDTH DOE, inclusive, are unknown to plaintiff at this time, who therefore sues said defendants by such fictitious names. When the true names and capacities of said defendants have been ascertained, plaintiff will amend this Complaint accordingly. Plaintiff is informed and believes and thereon alleges that each defendant designated herein as a DOE is responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and caused injuries and damages proximately thereby to the plaintiff, as hereinafter alleged.

2. At all times herein mentioned, each of the defendants was the agent, servant, employee and/or joint venturer of his co-defendants, and each of them, and at all said times, each defendant was acting in the full course and scope of said agency, service, employment and/or joint venture.

3. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, defendants RAYBESTOS-MANHATTAN, INC.; OWENS-CORNING FIBERGLAS CORPORATION; ACANDS, INC.; AMERICAN ASBESTOS COMPANY; ANCHOR PACKING COMPANY; ARMSTRONG CORK COMPANY; ASARCO, INC.; BABOCK & WILCOX; COMBUSTION ENGINEERING, INC.; CONSOLIDATED INSULATION, INC.; CROWN, CORK AND SEAL; DEE ENGINEERING COMPANY; M. H. DIETRICK COMPANY; DOUGLASS INSULATION CO., INC.; THE E. J. BARTELLS COMPANY; FLEXITALLIC, INC.; THE FLINTKOTE COMPANY; FOSTER WHEELER BOILER CORPORATION; FOSTER WHEELER CORPORATION; FOSTER WHEELER ENERGY CORPORATION; FOSTER WHEELER USA CORPORATION; GAF CORPORATION;

GARLOCK, INC.; W. R. GRACE & CO. -- CONN.; HAMILTON MATERIALS, INC.; KAISER CEMENT CORPORATION; KAISER GYPSUM CO., INC.; KEENE CORPORATION; METALCLAD INSULATION CORPORATION; NATIONAL GYPSUM COMPANY; OWENS-ILLINOIS CORPORATION; PFIZER, INC.; PITTSBURG CORNING CORPORATION; PLANT INSULATION COMPANY; QUIGLEY COMPANY, INC.; QUINTEC INDUSTRIES, INC.; RAPID AMERICAN CORP., as Successor in Interest to PHILIP CAREY MANUFACTURING CORP.; RAPID AMERICAN CORP., as Successor in Interest to PANACON CORP.; RAPID AMERICAN CORP., as Successor in Interest to PHILIP CAREY CORP.; RAPID AMERICAN CORP., as Successor in Interest to CAREY CANADA, INC.; RICHTEX, INC.; RILEY STOKER CORPORATION; SACOMO MANUFACTURING COMPANY; SACOMO SIERRA, INC.; SELBY, BATTERSBY & COMPANY; SYD CARPENTER, MARINE CONTRACTOR, INC.; THORPE INSULATION COMPANY; J T THORPE, INC.; TRIPLE A MACHINE SHOP, INC.; U. S. MINERAL PRODUCTS COMPANY; UNIROYAL, INC.; UNITED STATES GYPSUM COMPANY; WALDRON DUFFY; WESTERN MacARTHUR COMPANY; LORILLARD, INC.; HOLLINGSWORTH & VOSE COMPANY; and FIRST DOE through THREE HUNREDTH DOE, inclusive, are corporations organized and existing under and by virtue of the laws of the State of California, or the laws of some state or foreign jurisdiction, and that said defendants were and are authorized to do and are doing business in the State of California, and that said-defendants have regularly conducted business in the City and County of San Francisco, State of California.

4. Plaintiff is informed and believes, and thereon alleges, that defendant WESTERN MAC ARTHUR is the successor in interest to, or otherwise liable for the acts or omissions of

WESTERN ASBESTOS COMPANY and EAST BAY ASBESTOS COMPANY; that PITTSBURG CORNING CORPORATION is the successor in interest to, or otherwise liable for the acts or omissions of UNION ASBESTOS AND RUBBER COMPANY and/or UNARCO; that defendant QUINTEC INDUSTRIES, INC. is the successor in interest to, or otherwise liable for the acts or omissions of WESTERN FIBERGLAS SUPPLY COMPANY, WESTERN FIBROUS GLASS PRODUCTS COMPANY and/or WESGLAS; that defendant RAPID AMERICAN CORPORATION is the successor in interest to, or otherwise liable for the acts or omissions of PHILIP CAREY MANUFACTURING CORP., PANACON CORP., PHILIP CAREY CORP., and/or CAREY CANADA, INC.; that PLANT INSULATION COMPANY is the successor in interest to, or otherwise liable for the acts or omissions of PLANT ASBESTOS COMPANY and ASBESTOS COMPANY OF CALIFORNIA; and that each of the remaining defendants is liable for the acts and omissions of its predecessor entities.

5. At all times herein mentioned, defendants, and each of them, were and are engaged in the business of manufacturing, fabricating, designing, assembling, distributing, leasing, buying, selling, inspecting, servicing, repairing, marketing, warranting and advertising a certain substance, the generic name of which is asbestos, and other products containing said substance.

6. At all times herein mentioned, defendants, and each of them, singularly and jointly, negligently and carelessly researched, tested or failed to test, warned or failed to warn., manufactured, designed, developed, distributed, labeled, advertised, marketed, warranted, inspected, repaired, fabricated, modified, serviced, and sold a certain substance, the generic name of which is asbestos, and other products containing said substance, in that said substance was capable of causing and

did, in fact, Proximately cause personal injuries to users, consumers, workers and others, while being used in a manner reasonably foreseeable, thereby rendering said substance unsafe and dangerous for use by the consumers, users, bystanders, or workers exposed thereto.

7. Plaintiff herein is a worker who for a substantial length of time used, handled or been otherwise exposed to asbestos and asbestos products referred to in paragraph 6, in a manner that was reasonably foreseeable.

8. As a direct and proximate result of the conduct of the defendants, and each of them, as aforesaid, the exposure to asbestos caused severe and permanent injury to the plaintiff, including, but not limited to, asbestosis, other lung damage, and mesothelioma.

9. Plaintiff is informed and believes, and thereon alleges, that asbestosis is a progressive lung disease caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos products over a period of time.

10. Plaintiff presently believes that he suffers from a condition known as asbestosis or other diseases including mesothelioma related to the exposure to asbestos. Plaintiff was not aware that exposure to asbestos presented any risk of injury and/or disease to him, and had not been advised or informed by anyone that he could contact indeed did contact any disease, sickness or injury as a result of working in the vicinity of asbestos.

11. As a direct and proximate result of the aforesaid conduct of defendants, and each of them, plaintiff is dying and has suffered, and continues to suffer permanent injuries to his person, body and health, including but not limited to asbestosis, other lung damage, and cancer, all to his general damages in a sum in excess of the jurisdictional limits of the Municipal Court.

12. As a direct and proximate result of the aforesaid conduct of the defendants, and each of them, plaintiff has incurred, is presently incurring and will incur in the future, liability for physicians, surgeons, nurses, hospital. care, medicine, hospitals, x-rays and other medical treatment, the true and exact amount thereof being unknown to plaintiff at this time, and plaintiff prays leave to amend this Complaint accordingly when the true and exact cost thereof is ascertained.

13. Plaintiff MILTON J. HOROWITZ has lost prejudgment interest pursuant to Civil Code Section 3288, the exact amount of which plaintiff prays leave to insert herein when finally ascertained.

14. As a further direct and proximate result of the said conduct of defendants, and each of them, plaintiff has incurred, and will incur, loss of income, wages, profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to plaintiff, and leave is requested to amend this Complaint to conform to proof at the time of trial.

WHEREFORE, Plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

SECOND CAUSE OF ACTION - STRICT LIABILITY

AS FOR A SECOND, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR STRICT LIABILITY, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

15. Plaintiff incorporates herein by reference as though fully set forth herein, paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of the First Cause of Action herein.

16. Defendants and each of them, researched, manufactured, tested or failed to test, warned or failed to warn, de-

signed, labeled, distributed, advertised, marketed, warranted, inspected, repaired, offered for sale and sold a certain substance, the generic name of which is asbestos and other products containing said substance, which substance is defective, in that same was capable of causing and did, in fact, cause personal injuries, including asbestosis, other lung damage and cancer, to the users consumers thereof while being used in a reasonably foreseeable manner, thereby rendering the same unsafe and dangerous for use by consumers, users, bystanders and workers exposed thereto; said defendants, and each of them, further failed to adequately warn of the risks to which plaintiff and others similarly situated were exposed.

17. As a direct and proximate result thereof, plaintiff has suffered the injuries and damages previously alleged.

THIRD CAUSE OF ACTION - ENTERPRISE LIABILITY

AS AND FOR A THIRD, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR ENTERPRISE LIABILITY, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

18. Plaintiff incorporates by reference as though fully set forth herein, each of the paragraphs of the First and Second Causes of Action herein.

19. In the event plaintiff is unable to identify the specific defendants which supplied the asbestos or asbestos-containing products which caused the damage referred to above, plaintiff alleges that as between an innocent plaintiff and culpable defendants, the latter should bear the cost of injury.

20. Plaintiff was exposed to asbestos and asbestos emanating from asbestos-containing products which are and were fungible in appearance as well as in composition and which were used in substantially the same manner by plaintiff and/or those working in the vicinity of plaintiff. Moreover, through

no fault of the plaintiff, this asbestos and/or these asbestos-containing products cannot be traced to a specific producer.

21. In this action, plaintiff has joined a substantial share of the producers of such asbestos and/or asbestos-containing products which caused the injuries complained of herein, and will prove at the time of trial the respective market share of each defendant within this action. Accordingly, liability attaches to each named defendant to the extent of their percentage of market share, in a manner consistent with the rules set forth in the decision of Sindell v. Abbott Laboratories, et al.

22. As a direct and legal result thereof, plaintiff has suffered the injuries and damages previously alleged.

WHEREFORE, Plaintiff prays judgment against the defendants, and each of them, as hereinafter set forth.

FOURTH CAUSE OF ACTION - FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS Sec. 402-B

AS AND FOR A FURTHER, FOURTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS SECTION 402-B, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

23. Plaintiff incorporates by reference the entire Second Cause of Action of this Complaint.

24. At the aforementioned time when defendants, and each of them, researched, manufactured, tested or failed to test, warned or failed to warn, designed, labeled, distributed, advertised, marketed, warranted, inspected, repaired, offered for sale and sold the said asbestos and asbestos-containing products, as hereinabove set forth, the defendants, and each of them, expressly and impliedly represented to members of the

general public, including the purchases and users of said product, and including the plaintiff herein and his employers, that asbestos and asbestos-containing products were of merchantable quality, and safe for the use for which they were intended.

25. The purchasers and users of said asbestos and asbestos-containing products, including the plaintiff and his employers, relied upon said representations of defendants and each of them, in the selection, purchase and use of asbestos and asbestos-containing products.

26. Said representations by defendants, and each of them, were false and untrue, in that the asbestos and asbestos-containing products were not safe for their intended use, nor were they of merchantable quality as represented by defendants, and each of them, in that asbestos and asbestos containing products have very dangerous properties and defects whereby said products cause asbestosis, other lung disabilities and cancer, and have other defects that cause injury and damage to the users of said products, including plaintiff herein, thereby threatening the health and life of plaintiff.

27. As a direct and proximate result of said false representations by defendants and each of them, the plaintiff sustained the injuries and damages hereinabove set forth.

WHEREFORE, Plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FIFTH CAUSE OF ACTION - PUNITIVE DAMAGES

AS FOR A FURTHER, FIFTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR PUNITIVE DAMAGES, PLAINTIFFS MILTON J. HOROWITZ AND SHIRLEY HOROWITZ COMPLAIN OF DEFENDANTS, RAYBESTOS-MANHATTAN, INC., PITTSBURG CORNING CORPORATION, KEENE CORPORATION, OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS COR-

PORATION, ARMSTRONG CORK COMPANY, GARLOCK, INC., W.R. GRACE & COMPANY, WESTERN MACAR COMPANY, LORILLARD, INC., HOLLINGSWORTH & VOSE COMPANY, RAPID AMERICAN CORP. as successor-in-interest to PHILIP CAREY MANUFACTURING CORP., PANACON CORP., PHILIP CAREY CORP., and/or CAREY CANADA, INC., AND ELEVENTH DOE THROUGH FIFTIETH DOE, INCLUSIVE, AND EACH OF THEM, AND ALLEGE AS FOLLOWS:

28. Plaintiff incorporates by reference each and every paragraph of the First, Second, Third, Fourth and Seventh Causes of Action of this Complaint, and makes them a part of this, the Fifth Cause of Action, as though fully set forth herein.

29. In researching, testing, manufacturing, distributing, labeling, and marketing asbestos and asbestos products, defendants in this cause of action named, and each of them, did so with conscious disregard for the safety of the users of said asbestos and asbestos products, in that defendants has specific prior knowledge that there was a high risk of injury or death resulting from exposure to asbestos or asbestos products, including but not limited to, lung cancer and other forms of cancer, and asbestosis. Said knowledge was obtained, in part, from scientific studies and medical data to which defendants had access, as well as scientific studies performed by, at the request of, or with the assistance of, said defendants, and which knowledge was obtained by said defendants on or before 1933, and thereafter.

30. On or before 1933, and thereafter, said defendants were aware that users of asbestos and asbestos products, as well as members of the general public who would be exposed to asbestos and asbestos products, had no knowledge or information indicating that asbestos could cause injury, and said defendants knew that the users of asbestos and asbestos products, as well as members of the general public who were exposed to

asbestos and asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos products was safe, when in fact said exposure was extremely hazardous to human life.

31. With said knowledge, said defendants opted to manufacture and distribute said asbestos and asbestos products without attempting to protect users from or warn users of, the high risk of injury or death resulting from exposure to asbestos and asbestos products. Rather than attempting to protect users and workers from, or warn workers and users of, the high risk of injury or death resulting from exposure to asbestos and asbestos products, defendants intentionally failed to reveal their knowledge of said risk, and consciously and actively concealed and suppressed said knowledge from members of the general public that asbestos and asbestos products were safe for all reasonably foreseeable use, with the knowledge of the falsity of said implied representations.

32. The above-referenced conduct of said defendants was motivated by the financial interest of said defendants in the continuing, uninterrupted distribution and marketing of asbestos and asbestos products. In pursuance of said financial motivation, said defendants consciously disregarded the safety of the users of, and persons exposed to, asbestos and asbestos products, and were in fact, consciously willing to permit asbestos and asbestos products to cause injury to workers and users thereof, and personal exposed thereto, including plaintiff.

33. As the above-referenced conduct of said defendants was and is willful, malicious, outrageous, and in conscious disregard and indifferent to the safety and health of workers exposed to asbestos and asbestos products, including plaintiff, for the sake of example, and by way of punishing said defendants, seeks punitive damages according to proof.

SIXTH CAUSE OF ACTION - LOSS OF CONSORTIUM

AS AND FOR A FURTHER, SIXTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR LOSS OF CONSORTIUM, PLAINTIFF SHIRLEY HOROWITZ COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

34. Plaintiff SHIRLEY HOROWITZ incorporates herein by reference and makes a part hereof as though fully set forth herein, Paragraphs 1 through 33 and 38 through 51 of this Complaint.

35. Plaintiff SHIRLEY HOROWITZ is now, and at all times herein mentioned was, the lawfully wedded spouse of MILTON J. HOROWITZ.

36. As a direct and proximate result of the acts of defendants, and each of them, as set forth and incorporated herein by reference, and the severe injuries caused thereby to SHIRLEY HOROWITZ, as alleged in his Complaint, plaintiff SHIRLEY HOROWITZ has suffered, and for a long period of time will continue to suffer loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love and affection of her said spouse, and has suffered severe mental and emotional distress and general nervousness as a result thereof.

37. Plaintiff SHIRLEY HOROWITZ, as a result of the foregoing described injuries to her said spouse, has been generally damaged in a sum in excess of the jurisdictional limits of the Municipal Court.

WHEREFORE, Plaintiffs pray judgment against defendants, and each of them, as hereinafter set forth.

SEVENTH CAUSE OF ACTION - FRAUD

AS AND FOR A FURTHER, SEVENTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FRAUD, PLAINTIFF MILTON J. HOROWITZ COMPLAINS OF DEFENDANT, LORILLARD, INC. AND FORTIETH DOE THROUGH FIFTIETH DOE, INCLUSIVE, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

38. From 1952 through 1957 "Kent" cigarettes manufactured by defendant Lorillard, Inc. contained an asbestos containing "Micronite" filter. During the time "Kent" cigarettes included an asbestos-containing "Micronite" filter, defendant Lorillard, Inc. intentionally, recklessly or negligently misrepresented to plaintiff Milton J. Horowitz and the public and the medical profession that its "Kent" cigarette was safe, merchantable and fit for the use for which it was intended.

39. During the time "Kent" cigarettes included an asbestos-containing "Micronite" filter, defendant Lorillard, Inc. induced the public to smoke its cigarettes based upon considerations of health, safety and protection premised upon the design of the "Micronite" filter.

40. During the time "Kent" cigarettes included an asbestos-containing "Micronite" filter, defendant Lorillard, Inc. encouraged the medical profession through advertisements and demonstrations at medical conventions to sample, smoke and recommend "Kent" cigarettes based upon considerations of health, safety and protection provided by the design of the "Micronite" filter.

41. For some of the time "Kent" cigarettes included an asbestos-containing "Micronite" filter, representations by Lorillard, Inc. included but were not limited to the following statements which were placed in either print, radio or television advertising:

(a) "Kent offers you the greatest health protection in cigarette history;

(b) Kent gives you "a really good smoke and real health protection;"

(c) "Kent alone has the pure, safe, dust-free MICRONITE FILTER . . .;"

(d) Micronite is "a pure, dust-free, completely harmless material that is so safe, so effective, it actually is used to help filter the air in hospital operating rooms;"

(e) The "Micronite Filter . . . offers you far greater health protection than ordinary filters;"

42. On packages of "Kent" cigarettes with the asbestos-containing "Micronite" filter Lorillard, Inc. stated that:

"No other cigarette approaches such a degree of health protection and taste satisfaction."

43. The statement referred to in the preceding paragraph as well as the statements made in popular press advertisements were made in order to induce smokers to switch from their then current brand to "Kent" and remain "brand loyal" to "Kent".

44. The advertisements of "Kent" with the asbestos-containing "Micronite" filter in the medical journals were made in order to induce doctors to smoke "Kent" and to recommend "Kent" to their patients.

45. The representations made by Lorillard, Inc. were false. In truth, defendant Lorillard, Inc. manufactured and sold a cigarette with a filter which contained crocidolite, a form of

asbestos which it knew in 1952 could cause respiratory system diseases.

46. The representations made by Lorillard, Inc. that "Micronite" was "completely harmless," "safe," and "dust-free" were false and made after Lorillard, Inc. had received reports from two independent electron microscopists it had hired which showed that asbestos fiber from the "Micronite" filter was a contaminant of "Kent" cigarette smoke.

47. The representations made by Lorillard, Inc. were false. In truth, crocidolite asbestos is not "safe" and "harmless."

48. When defendant Lorillard, Inc. made its representations about "Kent" cigarettes with the asbestos-containing "Micronite" filter, it knew, or should have known that they were false, or made in a negligent or reckless manner without any knowledge or with insufficient knowledge that such representations were true.

49. When defendant Lorillard, Inc. made representations about "Kent" cigarettes with the asbestos-containing "Micronite" filter it knew or should have known that mineral fibers such as crocidolite asbestos were a respiratory hazard. Despite this knowledge, defendant Lorillard, Inc. suppressed and concealed this information from plaintiff Milton J. Horowitz in order to induce him and others to smoke and continue to smoke "Kent" cigarettes with the "Micronite" filter.

50. Plaintiff Milton J. Horowitz relied upon the representations of greater safety and health protection which appeared in the advertisements for the packages of "Kent" cigarettes in changing his brand to "Kent" in 1952, and in remaining "brand-loyal" to "Kent" until approximately 1962.

51. As a direct and proximate cause of defendant Lorillard, Inc.'s fraud, misrepresentation and outrageous conduct plaintiff Milton J. Horowitz smoked "Kent" cigarettes, thereby inhaling smoke contaminated with crocidolite asbestos, which

caused him to develop mesothelioma, an incurable cancer of the lining of the lung which will result in death.

WHEREFORE, Plaintiffs MILTON J. HOROWITZ and SHIRLEY HOROWITZ pray judgment against defendants, and each of them, as follows:

1. For plaintiffs' general damages according to proof;

2. For plaintiff MILTON J. HOROWITZ's loss of income, wages and earning potential according to proof;

3. For plaintiff MILTON J. HOROWITZ's medical and related expenses according to proof;

4. For plaintiffs' prejudgment interest according to proof, pursuant to Civil Code section 3288;

5. For plaintiffs, costs of suit herein;

6. As to those defendants named in the Fifth Cause of Action, for exemplary or punitive damages according to proof; and

7. For such other and further relief as this Court deems just and proper.

DATED: December 13, 1994

CARTWRIGHT, SLOBODIN, BOKELMAN,
BOROWSKY, WARTNICK, MOORE
& HARRIS, INC.

BY ---Harry F. Wartnick---
HARRY F. WARTNICK
Attorney for Plaintiffs

[630] in this case. He has nothing to do with my client. He was an advertising man for Lorillard. When I gave you that, I gave it to you with respect to Comproni and didn't even call your attention to the Thompson part, didn't even think of the Thompson parts.

The idea that I was trying to taint you with respect to this morning's motion deliberately by not telling you that Judge Bea had reversed himself, or I don't know if it had been recalled to my mind at the time I gave it to you, but since has been called to my mind, is just plain wrong. I was not misrepresenting it to you at all. It's the same thing Ms. Chaber tried when we moved to be admitted pro hac vice. She accused us of misrepresentation at that point.

I ask Your Honor to not credit that allegation. I did not taint you with respect to this morning's motion.

THE COURT: All right. Let's proceed on the merits.

MS. CHABER: Does the Court have defendants, objections to plaintiffs, deposition?

THE COURT: I have them all here, but they are just a series of numbers to me.

MS. CHABER: Right,

THE COURT: I didn't get the deposition until just now.

MS. CHABER: I understand that, and I apologize to Your Honor. We can probably just work directly off of the defendants' objections --

THE COURT: All right.

MS. CHABER: -- because they've listed the plaintiffs' [2050] answer every question, which is not what they are supposed to do.

Now, we've renumbered from the 1 on, so we would change these to make the numbers correspond to the appropri-

ate elements, but other than that change, it's perfectly accurate.

And one other thing, Your Honor, Counsel reminded me, Ms. Chaber this morning asked for an additional question. We can add that one in, too. That dealt with the appreciable harm, which we don't have an objection to.

THE COURT: The which?

MR. SCHOLL: She had asked -- I'm sorry, I've given the Court my only --

MR. BRAKE: It's a Prop 51 question. Did the plaintiff suffer appreciable harm before June 4th, '86?

MR. SCHOLL: It's the last question on Counsel's proposed special verdict, and I don't have any objection to add that in.

MR. EVANS: We can add that as 24.

MR. BRAKE: Counsel wanted that in case Prop 51 gets upheld.

Your Honor, I had a point with respect to the fraud questions, which I guess start with question 8. And under Plaintiffs' Counsel's form, Hollingsworth and Vose was listed, so for the time being, we put them on our form, but in the Amended Complaint that added us, there's no fraud claim **[2051]** against Hollingsworth and Vose, it's against Lorillard, and I didn't think there was a fraud claim against Hollingsworth and Vose, and I don't think there was any evidence directed at that.

And I guess my request is I don't know what the plaintiff thinks about it, but I would think that we would take Hollingsworth and Vose off those questions.

MR. SCHOLL: It's on both forms, so we can clearly drop it off our forms, as well.

MR. BRAKE: You can see Hollingsworth and Vose is specifically listed in here where they have claims against them.

MS. CHABER: The evidence that came into trial, Your Honor, was the agreement that they basically were in this to-

gether for all things and for all actions, including advertising of the product, if the Court recalls.

MR. BRAKE: Maybe we can take it up on a nonsuit, but -- Counsel, if I understand what she's saying, there's a sufficient agency relationship that the advertising fraud claim should be attributed to my client. I think that's incorrect as a matter of law. There's a contract to supply the filter material. Your Honor can reread it. That's not sufficient to create any kind of agency relationship for this fraud claim.

And above all, if I'm going to be sued for fraud, I think you have to plead it and not just argue the contract, which is a straightforward contract to supply material. I would submit, Your Honor, there is no fraud claim.

If you prefer, we can take it up as a nonsuit, but that's the issue. There's no evidence of any **[2052]** misrepresentations from H and V separate from Lorillard. She's trying to attribute the advertisements to –

MS. CHABER: Because they have an indemnity agreement, Your Honor, and that was one of the points of the indemnity agreement, Your Honor, the indemnity paragraph, was that it contemplated any actions.

MR. SCHOLL: Why don't we --

MR. BRAKE: We will take it up as a nonsuit.

MR. SCHOLL: We can always alter the instruction if that becomes necessary.

THE COURT: All right.

MR. SCHOLL: Your Honor, if Your Honor is in agreement, then we would modify the special verdict, since I've got that on disk and Counsel has already started modifying the other ones that we had already agreed to. And to the extent that we need to modify 17.14, I guess we should modify that, as well, since we've got that on disk and Counsel doesn't.

THE COURT: Yes.

MS. CHABER: The other matter, Your Honor, was the matter of rebuttal.

THE COURT: Yes.

MS. CHABER: And I faxed to Counsel this morning some proposed rebuttal, which is reading from deposition of Dr. Alexander Spears, who is the CEO and Chairman of the Board of Lorillard.

THE COURT: All right.

MR. OHLEMEYER: And Your Honor, I object to it in its [2071] YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BRAKE: DON'T KNOW IF HOLLINGSWORTH VOSE MATTERS UNTIL AFTER YOU HAVE RULED ON THE LORILLARD ONES.

THE COURT: NO, GO AHEAD.

MR. BRAKE: I HAVE TWO. ONE WHICH I ALLUDED TO EARLIER, YOUR HONOR, WHICH IS IN COUNT 7 OF THE COMPLAINT.

THERE IS NO FRAUD CLAIM ASSERTED AGAINST HOLLINGSWORTH & VOSE. THE FIRST INKLING THAT I CAN RECALL OF A FRAUD CLAIM AGAINST HOLLINGSWORTH & VOSE IS THE INCLUSION OF THE COMPANY NAME IN THE QUESTIONS, IN PLAINTIFFS PROPOSE SPECIAL VERDICT.

FORM THAT BASIS ALONE, I RESPECTFULLY SUBMIT YOU HAVE A SUGGESTION OF A FRAUD CLAIM. THIS SHOULD BE DISMISSED BY NONSUIT, DIDN'T PLEAD AS NONE, NOT PLEAD WITH, NOT ONLY NOT WITH PARTICULARITY; BUT PLEAD IT AT ALL. I WASN'T ON NOTICE THEY WERE PROCEEDING WITH IT.

I SHOULDN'T HAVE TO HAVE IT SUBMITTED TO THE JURY.

IN ADDITION, YOUR HONOR, THE ARGUMENT THAT COUNSEL, PLAINTIFF CAME FORWARD WITH, JUST MENTIONED AN HOUR OR SO, ONGOING, OH, WELL, BECAUSE OF THE CONTRACT BETWEEN THE COMPANY, TWO COMPANIES DEVELOPED THE FILTER MATERIAL AND, FOR HOLLINGSWORTH & VOSE, H AND V SPECIALTIES TO SELL THE FILTER MATERIAL, [2072] LORILLARD BECAUSE OF THAT, THEY SHOULD BE DEEMED IN SOME FASHION TO BE RESPONSIBLE FOR WHATEVER REPRESENTATION THE PLAINTIFF, DEFENDANT LORILLARD MADE.

I RESPECTFULLY SUGGEST THAT IS WRONG AS A MATTER OF LAW.

AS I UNDERSTAND THE LAW, WHAT COUNSEL IS REALLY SAYING, THEY SHOULD BE DEEMED TO BE LIABLE FOR EACH OTHER. AND I BELIEVE THE ONLY TIME YOU CAN DO THAT BETWEEN TWO COMPANIES IN TIME OF COMMERCIAL RELATIONSHIP, IS TO ESTABLISH THEY ARE IN FACT JOINT VENTURE.

THEY ARE, HAVE CONTROL, SUFFICIENT CONTROL OVER EACH OTHERS BUSINESS OPERATIONS; THAT THEY ARE EACH OTHERS AGENTS FOR ALL PURPOSES INCLUDING THE PURPOSES OF REPRESENTATIONS.

THERE IS NO PROOF OF THAT. IN FACT IT IS NOT TRUE. PLAINTIFF COULDN'T PROOF IT IF SHE HAD SET OUT TO DO IT AND PLEAD IT.

SO, THE CLAIM SHOULD BE DISMISSED. I WOULD POINT TO, YOUR HONOR, IN EXHIBIT 105 WHICH IS A CONTRACT BETWEEN THE PARTIES, THEY SET OUT THE AGREEMENT:

"SHALL NOT BE CONSTRUED," IN PARAGRAPH 25 ON PAGE 19, "THIS AGREEMENT SHALL IN NO WAY BE CONSTRUED AS CREATING A RELATIONSHIP OF

PRINCIPAL AND AGENT OR PARTNERSHIP OR JOINT VENTURE BETWEEN THE PARTIES HERETO";

[2073] PUTS LIMITS ON EACH OTHERS ABILITY TO PLEDGE THE CREDIT OF THE OTHER AND SUCH, BE RESPONSIBLE FOR EACH OTHERS OBLIGATIONS.

THAT FUNDAMENTALLY HOLLINGSWORTH & VOSE HAD NO CONTROL OVER MARKETS, AS I SAY, COUNSEL FOR PLAINTIFF COULDN'T PROVE THAT IF THEY HAD SET OUT TO DO SO,

ON THAT BASIS, THE FRAUD CLAIM SHOULD BE NONSUITED AGAINST HOLLINGSWORTH & VOSE. I WOULD JOIN, TO THE EXTENT THAT, THAT IT PURPORTS TO STATE AGAINST HOLLINGSWORTH & VOSE, I WOULD JOIN IN THE GROUNDS SET FORTH BY COUNSEL FOR LORILLARD.

WITH REGARD TO CLAIMS IN COUNT 5 FOR PUNITIVE DAMAGE, I WOULD SIMPLY NOTE AS TO HOLLINGSWORTH & VOSE, THERE IS NO EVIDENCE SUFFICIENTLY THAT A REASONABLE JURY COULD FIND FRAUD, OPPRESSION, OR MALICE WITH RESPECT TO THE PLAINTIFF. THERE SIMPLY ISN'T EVIDENCE FOR THAT.

I JUST WANT TO POINT THAT OUT. I WOULD MOVE FOR NONSUIT ON THAT AS WELL. THANK YOU.

MS. CHABER: YOUR HONOR, HOLLINGSWORTH VOSE WERE FULLY AWARE OF WHAT WAS BEING DONE AND STUDIED. IN EFFECT, THERE IS THE, IN FACT, THAT LETTER FORWARDED TO PARMELE ABOUT THE PROBLEMS WITH ASBESTOS. SO THEY WERE AWARE OF THE TESTS AND STUDIES THAT WERE BEING DONE.

THEY CONTINUED TO SUBMIT THE MATERIALS SO THAT LORILLARD COULD CONTINUE TO SELL IT.

AND IN [2074] THAT SENSE, THEY ARE BASICALLY JOINED TOGETHER ON THAT.

LORILLARD COULD NOT SELL A FILTER CIGARETTES WITHOUT HOLLINGSWORTH VOSE.

AND THIS AGREEMENT IN TOTAL SETS FORTH THAT THESE TWO DEFENDANTS, AS TO THIS PROJECT, THE PARAGRAPH THAT WAS READ TO YOU RELATES TO THEM NOT BEING AGENTS FOR EACH OTHER IN ANY OTHER BASES; BUT THIS AGREEMENT IN IT TOTALITY SETS FORTH THE FACT THAT THIS IS A JOINT VENTURE AND IT IS A JOINT VENTURE BETWEEN THE TWO OF THEM.

THEY OWNED THE RIGHTS IN EACH OTHER, EVERYTHING INCLUDING THE PATENTS AND MACHINERY, INCLUDING THE INVENTORY AND INCLUDING THE SALES.

AND THIS IS SET FORTH THROUGH ALL OF THE PARAGRAPHS AND LETTERS IN THE PARAGRAPHS; THAT THIS IS ONE OF THE REASONS THAT I CALLED THIS TO THE COURT'S ATTENTION, BECAUSE THAT PARAGRAPH THAT THE COURT DELETED SPECIFICALLY RELATES TO MISREPRESENTATIONS; AND THAT LORILLARD WOULD INDEMNIFY HOLLINGSWORTH & VOSE.

AND THINK THAT IT IS CLEAR THAT THEY WERE IN THIS TOGETHER AND THAT EVERYTHING THAT OCCURRED AND EVERYTHING THAT WAS OWNED AND EVERYTHING THAT WAS DONE WAS DONE ON BEHALF OF BOTH OF THESE DEFENDANTS AND NOT JUST ONE OF THEM.

THE COURT: OKAY. ALL RIGHT. I WILL DENIED ALL THE MOTIONS FOR NONSUIT. YOU CAN CALL IN [2087] UNSUCCESSFUL.

THIS IS 43-G. THIS IS PARMELE AGAIN TO FULLAM INDICATING THAT HE IS SENDING SAMPLES. 5 PACKAGES EACH OF VARIOUS TYPES, INCLUDING REGULAR KENTS AND THAT, OF COURSE, MAKES SENSE BECAUSE THEY NEEDED TO HAVE SOMETHING TO COMPARE IT TO.

AND WHAT THEY HAVE, NEED TO HAVE WAS THE REGULAR KENT TO SEE WAS ASBESTOS GETTING OUT AND THEN TO COMPARE IT TO THESE EXPERIMENTAL TYPE FILTERS THAT THEY WERE TRYING. ONLY, WHATEVER THEY TRIED, DIDN'T WORK.

NOW, THROUGHOUT THIS, I HAVE BEEN TALKING MAINLY ABOUT LORILLARD; BUT ALL MY REMARKS GO AS WELL TO HOLLINGSWORTH & VOSE BECAUSE THESE TWO COMPANIES WERE IN THIS THING TOGETHER.

PLAINTIFF'S EXHIBIT 105 IS THE AGREEMENT BETWEEN THEM. THEY EACH OWNED AN INTEREST IN THE MACHINERY, IN THE PROCESS, IN THE INVENTIONS. THEY WERE IN THIS TOGETHER. THEY COULDN'T HAVE DONE IT SEPARATELY.

LORILLARD NEEDED HOLLINGSWORTH & VOSE TO MAKE THE KENTS; HOLLINGSWORTH & VOSE NEEDED A PLACE TO SELL THE MATERIAL. SO, THEY COMBINED TOGETHER TO MAKE TWO ENDS, THE ENDS THAT WOULD PUT TOGETHER THE FILTER AND THE CIGARETTE.

SO, ALL OF THE REMARKS GOES, THAT I HAVE BEEN MAKING, GOES TO HOLLINGSWORTH & VOSE AS WELL.

PLAINTIFF 43-0 MAKES IT CLEAR THAT THEY

APPENDIX F.

FILED
San Francisco County Superior Court
SEP 22 1995
ALAN CARLSON, Clerk
/s/
By:_____
Deputy Clerk

HARRY F. WARTNICK (Bar No. 54761)
MADELYN J. CHABER (Bar No. 88950)
WARTNICK, CHABER, HAROWITZ, SMITH & TIGERMAN
101 California Street, Suite 2675
San Francisco, California 94111
Telephone (415) 986-5566

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWTIZ and SHIRLEY HOROWITZ,	No. 965245
Plaintiffs,	
vs.	NOTICE OF ENTRY OF JUDGMENT
RAYBESTOS-MANHATTAN, INC.; et al.,	
Defendants.	

TO DEFENDANTS LORILLARD, INC. AND HOLLINGSWORTH VOSE COMPANY, AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 21, 1995, judgment was entered in the above-entitled action in favor of Plaintiffs Milton J. Horowitz and Shirley Horowitz against Defendants Lorillard, Inc. and Hollingsworth & Vose Company.

SAID JUDGMENT WAS ENTERED AS FOLLOWS:

Plaintiff Milton J. Horowitz have judgment against Defendants Lorillard, Inc. and Hollingsworth & Vose Company, jointly and severally, in the amount of $986,886.70, plus post judgment interest thereon at a rate of ten (10) percent per annum.

Plaintiff Shirley Horowitz have judgment against Defendants Lorillard, Inc. and Hollingsworth & Vose Company, jointly and severally, in the amount of $235,195.64, plus post judgment interest thereon at a rate of ten (10) percent per annum.

Plaintiff Milton J. Horowitz have judgment against Defendant Lorillard, Inc. for punitive damages in the sum of $560,000.00, plus post judgment interest thereon at a rate of ten (10) percent per annum.

Plaintiff Milton J. Horowitz have judgment against Defendant Hollingsworth & Vose Company for punitive damages in the sum of $140,000.00, plus post judgment interest thereon at a rate of ten (10) percent per annum.

Plaintiffs Milton J. Horowitz and Shirley Horowitz recover their actual costs and disbursements as taxed.

Copy of signed Judgment on Special Verdict attached herewith and incorporated herein.

Dated: 9/22/95

WARTNICK, CHABER, HAROWITZ,
SMITH & TIGERMAN

By:/s/_____
MADELYN CHABER
Attorney for Plaintiffs

APPENDIX G.

ENDORSED
FILED
San Francisco County Superior Court
SEP 21 1995
ALAN CARLSON, Clerk
SUPERIOR COURT
By: S. DOUGLAS
Deputy Clerk

HARRY F. WARTNICK (Bar No. 54761)
MADELYN J. CHABER (Bar No. 88950)
WARTNICK, CHABER, HAROWITZ, SMITH & TIGERMAN
101 California Street, Suite 2675
San Francisco, California 94111
Telephone (415) 986-5566

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWTIZ and SHIRLEY HOROWITZ,	No. 965245
Plaintiffs,	
vs.	JUDGMENT ON SPECIAL VERDICT
RAYBESTOS-MANHATTAN, INC.; et al.,	
Defendants.	

This action came on regularly for trial by jury on July 31, 1995 in Department X-5 of the above-entitled court, the Honorable Winton McKibben, Judge presiding.

A jury of twelve (12) persons were empaneled and sworn to try the liability and compensatory damage issues. Witnesses were sworn and testified. After hearing the evidence and argument of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on liability and compensatory damages. The jury deliberated-and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find the following Special Verdict on the questions submitted to us:

Question No. 1:

Did plaintiff Milton Horowitz smoke Kent cigarettes with asbestos containing filters?

	Yes	No
Answer	X	___

If your answer to this question is "no", then answer no other questions and sign, date and return this verdict form. If your answer to this questions is "yes", then proceed to the next question.

Question No. 2:

Was there a defect in design of the product of defendants: a. by failing to perform as safely as an ordinary consumer of such product(s) would expect?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

that product, but which danger was known or knowable to defendant(s)?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

c. because the risk of the product's design outweighed the benefits of the design?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer is "no" as to each defendant to Question No. 2(a) and 2(b) and 2(c), answer Question No. 6 next. If your answer "yes" as to one or more defendants to Question No. 2(a) or 2(b), or 2(c), then answer the next question only as to such defendants.

Question No. 3:

As to each defendant that you answered "yes" for in Question No. 2(a) or 2(b) or 2(c), did the defect exist when it left the possession of such defendant?

Answer "yes" or "no" after the name of each such defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer is "no" as to all defendants, answer Question No. 6 next. If your answer is "yes" as to one or more defendants as to Questions No. 2(a) or 2(b) or 2(c) and Question No. 3, then answer the next question.

Question No. 4:

Question No. 4:

As to each defendant that you have answered "yes" to as to Questions No. 2(a) or 2(b) or 2(c) and Question No. 3, was the defect a cause of injury to plaintiff?

Answer "yes" or "no,, after the name of each such defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer is "no" as to all defendants, answer Question No. 6 next. If your answer is "yes" as to one or more defendants to Questions No. 2(a) or 2(b) or 2(c), and Question No. 3, and Question No. 4, then answer the next question.

Question No. 5:

As to each defendant that you answered "yes" for in Questions No. 2(a) or 2(b) or 2(c), and Question No. 3 and Question No. 4, was plaintiff's injury caused by a use of the product that was reasonably foreseeable by such defendant?

Answer "yes" or "no" after the name of each such defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

Answer Question 6 next.

Question No. 6:

Was any defendant negligent?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer to Question No. 6 is "no" as to all defendants, and you have answered "no" to any of Questions 2(a) and 2(b) and 2(c), or Question No. 3, or Question No. 4 or Question No. 5 as to all defendants, answer Question 8 next.

If your answer to Question No. 6 is "yes" as to any defendant, then answer the next question.

Question No. 7:

Was the negligence of defendants a cause of injury to plaintiff?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

Answer Question 8 next.

Question No. 8:

Did a defendant make a representation as to a past or existing material fact?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer Question No. 8 is "no" as to each defendant, answer Question 16 next. If your answer to Question No. 8 is "yes" as to either defendant, then answer the next question.

Question No. 9:

Was the representation false?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer to Question No. 9 is "no" as to each defendant, then answer Question 16 next. If your answer to Question No. 9 is "yes" as to any defendant, then answer Questions 10a, 10b and 10c.

Question No. 10a:

Did the defendant know that the representation was false when it made it?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

Question No. 10b:

Did the defendant make the representation recklessly without knowing whether it was true or false?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

Question No. 10c:

Did the defendant make the representation without any reasonable grounds for believing it to be true?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer to Questions 10a, 10b and 10C is "no" as to each defendant, answer Question 16 next. If your answer to either Question No. 10a, 10b or 10c is "yes" as to any defendant, then answer the next question.

Question No. 11:

Did the defendant make the representation with an intent to defraud the plaintiff?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer to Question No. 11 is "no" as to each defendant, answer Question 16 next. If your answer to Question No. 11 is "yes" as to any defendant, then answer the next question.

Question No. 12:

Was the plaintiff aware of the falsity of the representation?

Answer "yes" or "no".

Answer: ___ Yes X No

If your answer Question No. 12 is "yes", answer Question 16 next. If your answer to Question No. 12 is "no", then answer the next question.

Question No. 13:

Did the plaintiff act in reliance upon the truth of the representation?

Answer "yes" or "no".

Answer: X Yes ___ No

If your answer to Question No. 13 is "no", answer Question 16 next. If your answer to Question No. 13 is "yes", then answer the next question.

Question No. 14:

Was the plaintiff justified in relying upon the representation?

Answer "yes" or "no".

Answer: X Yes ___ No

If your answer to Questions No. 14 is "no", answer Question 16 next. If your answer Question No. 14 is "yes", then answer the next question.

Question No. 15:

Did defendant's misrepresentation cause plaintiff damage?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

Answer Question 16 next.

Question No. 16:

Did the defendant conceal or suppress a material fact?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer to Question No. 16 is "no" as to each defendant, answer Question 21 next, if applicable. If your answer to Question No. 16 is "yes" as to any defendant, then answer the next question.

Question No. 17:

Did the defendant intentionally conceal or suppress the fact with the intent to defraud the plaintiff?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

If your answer to Question No. 17 is "no" as to each defendant, answer Question 21 next, if applicable. If your answer to Question No. 17 is "yes" as to any defendant, then answer the next question.

Question No. 18:

Was the plaintiff aware of the fact at the time plaintiff acted?

Answer "yes" or "no."

Answer: No

If your answer to Question No. 18 is "yes", answer Question 21 next, if applicable. If your answer to Question No. 18 is "no", then answer the next question.

Question No. 19:

Would plaintiff have acted in the way plaintiff acted if plaintiff had known of the concealed or suppressed fact?

Answer "yes" or "no."

Answer: No

If you answer Question No. 19 is "yes", answer Question 21 next, if applicable. If your answer to Question No. 19 is "no", then answer the next question.

Question No. 20:

Did defendant's concealment or suppression of the fact cause plaintiff damage?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

Answer Question No. 21, if applicable.

If you have:

a) answered Questions 2(a) or 2(b) or 2(c), and Question 3, Question 4 and Question 5 "yes" as to any defendant, or

b) answered Questions 6 and 7 "yes" as to any defendant, or

c) answered Questions 8, 9, 10a, 10b or 10c, 11, 13, 14, 15 "Yes" as to any defendant and if you have answered Question 12 "no" as to the plaintiff, or

d) answered Questions 16, 17 and 20 "yes" as to any defendant and Questions 18 and 19 "no" as to the plaintiff, then answer Question 21. Otherwise, sign, date and return this verdict form.

Question No. 21:

What do you find to be the total amount of damages, including economic and non-economic damages, if any, suffered by any plaintiff and caused by a defective product manufactured or sold by any defendant, the negligence of any defendant, or the misrepresentation or concealment by any defendant?

Milton Horowitz:

Answer (a) Economic Damages	$ 350 K
Answer (b) Non-Economic Damages	$ 700 K
TOTAL	$ 1050 K

Shirley Horowitz:

Answer - Loss of Consortium	$ 250 K

If your answer is "0.00" as to each plaintiff, sign and return this verdict form. If you have found a dollar amount in response to Question No. 21 for either plaintiff, then answer the next question.

Question No. 22:

Assuming that 100 % represents the total causes of each plaintiff's injury, what percentage of this 100% is attributable is attributable to the negligence or wrongful conduct of the defendants and all other persons?

Answer:

To defendant Lorillard, Inc.	50 %
To defendant Hollingsworth & Vose	50 %
Other persons/entities	%
TOTAL	100 %

Answer Question 23 next.

Question No. 23:

Was Milton Horowitz first appreciably harmed by asbestos before June 4, 1986?

Answer "yes" or "no."

Yes	No
X	

Answer Question 24 next, if applicable.

INTRODUCTION TO QUESTION 24

If you have:

a) answered Questions 2(a) or 2(b) or 2(c), and Question 3, and Question 4 and Question 5 "yes" as to any defendant, or

b) answered Question 6 and 7 "yes" as to any defendant, or

c) answered Question 8, 9, 10a or 10b, 11, 13, 14, and 15 "yes" as to any defendant and if you have answered Question 12 "no" as to the plaintiff, or

d) answered Questions 16, 17 and 20 "yes" as to any defendant and Questions 18 and 19 "no" as to the plaintiff, then answer Question No. 24 next. Otherwise, sign, date and return this verdict form.

Question No. 24:

Do you find by clear and convincing evidence that any defendant was guilty of malice, oppression or fraud in the conduct on which you base your finding of liability?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Lorillard, Inc.	X	___
	Hollingsworth & Vose	X	___

DATED: 8/31/95

FOREPERSON Peter J. Villani

Thereafter the issue of whether punitive damages should be assessed against the defendant and if so what amount was submitted to the jury after a brief evidentiary presentation. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on punitive damage issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

Question No. 1a:

Shall punitive damages be assessed against defendant Lorillard, Inc.?

Answer "yes" or "no".

Yes X

No ___

Question No. 1b:

Shall punitive damages be assessed against defendant Hollingsworth & Vose Company?

Answer "yes" or "no".

Yes X

No ___

If your answer to either the above questions is "yes", answer the next question. If your answer is "no", have your foreperson sign and date this special verdict.

Question No. 2:

We assess punitive damages against defendant as follows:

Lorillard, Inc. .	$ 560 K
Hollingsworth & Vose Company	$ 140 K

Dated: 9/1/95 Peter Villani

Foreperson

Plaintiffs confessed to the court to settlements of present, past and potential future causes of action totaling $111,311.00. Following briefing and argument on September 15, 1995, the court ruled that thirty (30) percent of the prior settlements was allocated to the future wrongful death cause of action ($ 33,393.30) and that the remaining seventy (70) percent ($ 77,719.70) was allocated to the claims of Milton J. Horowitz and Shirley Horowitz tried in this action.

Following briefing and argument on September 15, 1995, at defendant's request, the Court ruled that plaintiffs, appreciable asbestos harm occurred before June 4, 1986 and that the provisions of Proposition 51 (Civil Code Section 1431.1 et. seq.) do not apply to the causes of action tried in this case.

Therefore, since the jury found that Milton J. Horowitz's compensatory damages were eighty one (81) percent of the total compensatory damages awarded, defendants are entitled to a credit of $63,113.34 (81% of $77,917.70) against Milton J. Horowitz's award. Similarly, defendants are entitled to a credit of $14,804.36 (19% of $77,917.70) against Shirley Horowitz's award.

It appearing that by reason of such Special Verdicts, prior settlements and Orders of the Court, Plaintiffs are entitled to entry of judgment based on the following net amounts:

1. To Plaintiff Milton J. Horowitz against Lorillard, Inc. and Hollingsworth & Vose company, jointly and severally, in the amount of $986,886.70 ($1,050,000.00 minus $63,113.34).
2. To Plaintiff Shirley Horowitz against Lorillard, Inc. and Hollingsworth & Vose company, jointly and sev-

erally, in the amount of $235,195.64 ($250,000.00 minus $14,804.36).

3. To Plaintiff Milton J. Horowitz against Lorillard, Inc. in the amount of $560,000.00 punitive damages.
4. To Plaintiff Milton J. Horowitz against Hollinsworth and Vose Company in the amount of $140,000.00 punitive damages.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That Plaintiff Milton J. Horowitz have judgment against Defendants Lorillard, Inc. and Hollingsworth & Vose Company, jointly and severally, in the amount of $986,886.70, plus post judgment interest thereon at a rate of ten (10) percent per annum.

That Plaintiff Shirley Horowitz have judgment against Defendants Lorilllard, Inc. and Hollingsworth & Vose Company, jointly and severally, in the amount of $235,195.64, plus post judgment interest thereon at a rate of ten (10) percent per annum.

That Plaintiff Milton J. Horowitz have judgment against Defendant Lorillard, Inc. for punitive damages in the sum of $560,000.00, plus post judgment interest thereon at a rate of ten (10) percent per annum.

That Plaintiff Milton J. Horowitz have judgment against Defendant Hollingsworth & Vose Company for punitive damages in the sum of $140,000.00, plus post judgment interest thereon it a rate of ten (10) percent per annum.

That Plaintiffs Milton J. Horowitz and Shirley Horowitz recover their actual costs and disbursements as taxed.

Date: SEP 21 1995

/s/ WINTON McKIBBEN
Judge of the Superior Court

APPENDIX H.

FILED
Court of Appeal - First App. Dist.
JUN 14 1996
RON D. BARROW, CLERK
By_____
DEPUTY

No. A072695

COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

MILTON HOROWITZ and
SHIRLEY HOROWITZ,

Plaintiffs and Respondents,

v.

HOLLINGSWORTH & VOSE COMPANY, et al.,

Defendants and Appellants,

APPELLANT HOLLINGSWORTH & VOSE COMPANY'S OPENING BRIEF

On Appeal from a Judgment of the
San Francisco County Superior Court
(No. 965245)
Honorable Winton McKibben, Judge

DONALD F. ZIMMER, JR. (No. 112279)
CYNTIHA C. ROENISCH (No. 151908)
PREUSS WALKER & SHANAGHER LLP
595 Market Street, 16th Floor
San Francisco, California 94105-2825
Telephone: (415) 978-2600
Facsimile: (415) 978-2613

ANDREW J. McELANEY, JR.
STEPHEN J. BRAKE
NUTTER, MCCLENNEN & FISH
One International Place
Boston, Massachusetts 02110-2699
Telephone: (617) 439-2000
Facsimile: (617) 973-9748

Attorneys for Appellant Hollingsworth & Vose Company

. . . respirable asbestos fibers when smoked, and that these fibers were a substantial factor in causing Dr. Horowitz's mesothelioma. To prove this latter point, plaintiffs relied upon a pure statistical inference. The jury then found that Kent cigarettes were the cause of Dr. Horowitz's illness.

H&V moved for a new trial on the grounds that the trial court erred in submitting to the jury the issue of fraud on the part of H&V and that there was insufficient evidence to support the jury's findings. (C.T., at 2082-98.) The motion for new trial was denied and judgment entered. (C.T., at 2482.)

II. ARGUMENT

A. The Trial Court's Submission To The Jury Of The Fraud Claim Against H&V Denied H&V A Fair Trial, Violated The Constitutional Guaranty Of Due Process And Was Contrary To The Fair Operation Of The Rules Of Procedure.

1. The Trial Court's Action in Submitting the Fraud Claim to the Jury Violated the Due Process Guaranty of the Fourteenth Amendment to the United States Constitution.

The constitutional right to due process of law guarantees that a person receive notice and an opportunity to be heard before he may be deprived of property. U.S. Const. amend. XIV; *U.S. v. James Daniel Good Real Property* (1993) 510 U.S. 43. Thus, when a civil action is resolved against a party on the basis of a legal theory of which the party had no notice, the constitutional guaranty of due process is violated. *Doubleday & Co., Inc. v. Curtis* (2d Cir. 1985) 763 F.2d 495, 502-503 (court violated defendant's due process rights by dismissing counterclaim based on waiver theory which had not been issue at trial), *cert. dismissed,* (1985) 474 U.S. 912; *Jimenez v. Tuna Vessel Granada* (5th Cir. 1981) 652 F.2d 415; *Armstrong Cork Co. v. Lyons* (8th Cir. 1966) 366 F.2d 206. A litigant's due process rights include the right to litigate the issues in its case fully and fairly. *duPont v. Southem Nat. Bank of Houston* (5th Cir. 1985) 771 F.2d 874, *cert. denied,* (1986) 475 U.S. 1085. In *Jimenez,* the court reversed a judgment against the defendants that was based on an unpled legal theory. The court found that defendants' due process rights were violated because they did not get fair notice of the unpled theory and thus were subject to "trial by ambush." *Jimenez,* 652 F.2d at 420.

Here, the trial court's action in allowing a claim — which was, contained in no pleading, and was not otherwise disclosed by the plaintiff — to be submitted to the jury, violated due process. H&V was never given notice of — and did not defend — the fraud claim. The question of the fraud claim only arose after the submission of all the evidence, in the context of argument regarding plaintiffs' proposed jury questions. There was no meaningful notice to H&V, no meaningful opportunity to be heard and no opportunity to defend the claim.

The jury's verdict therefore violates the constitutional guaranty of due process of law and should be vacated.

2. The Submission Of The Fraud Claim To The Jury Was A Fundamentally Unfair Violation Of The Rules Of Pleading And Procedure.

To protect the fundamental constitutional guaranty of due process, the Code of Civil Procedure requires the filing of a complaint to frame the issues and give the defendant notice of the claims it must defend. *Comm. on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211-212, 197 Cal. Rptr. 783, 673 P.2d 660. Fraud claims in particular are subject to strict requirements regarding specificity in pleading: every element must be specifically alleged and the policy of liberal construction will not be applied to remedy a defective pleading. *Id.* at 216. One reason for this requirement is that "allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense." *Id.*, quoting 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading §574; *see also, Lavine v. Jessup* (1958) 161 Cal. App. 2d 59, 69, 326 P.2d 238 (upholding dismissal of fraud claim for lack of specificity).

When it allowed the unpled fraud claims against H&V to be submitted to the jury, the trial court ignored these basic pleading requirements. Because H&V was not given notice that it was facing a fraud claim, it was deprived of its due process rights and any opportunity to prepare its defense. The plaintiffs did not plead a fraud claim against H&V, with specificity or otherwise. The notion that there could be a fraud claim against H&V did not arise until the Court heard argument on the jury instructions and the special verdict form at the conclusion of the trial. At that point all parties had rested and H&V was in the unique situation of having to move for a nonsuit with respect to a claim that was not even pled — either in the original complaint or by amendment — and that H&V had not had a chance to defend.

The trial court violated H&V's constitutional due process rights and otherwise denied it a fair trial by allowing the assertion of a new cause of action — after the evidence had closed — with elements distinctly different from the elements of the causes of action that were tried. H&V's counsel, for instance, did not mention fraud in the opening statement and did not seek to establish that H&V never made any statements upon which plaintiffs relied.

Plaintiffs hid their intent to assert fraud until the evidence was closed. The trial court effectively sanctioned this strategy, abrogating the rules of pleading, including the rule that fraud must be pled with specificity. This deprived H&V of a meaningful opportunity to defend itself and caused a miscarriage of justice.

3. The Complaint Was Never Amended to Add a Fraud Claim Against H&V, and in Any Event, No Such Amendment Would Have Been Proper Because the Fraud Claim Was Not Known to H&V or Explored at Trial.

Plaintiffs may argue that, in allowing a fraud claim, the court impliedly permitted an amendment to the pleadings to conform to the proof, even though the complaint was never explicitly amended. This argument fails both because plaintiffs never sought an amendment (and none was granted) and because the standard for such an amendment cannot be met here. Under Code of Civil Procedure section 469, a pleading may not be amended to conform a variance between pleading and proof if the amendment would prejudice the adverse party. *Trajlon v. Youngblood* (1968) 69 Cal. 2d 17, 442 P.2d 648; *Makovsky v. Makovsky* (1958) 158 Cal. App. 2d 738, 744, 323 P.2d 562. A motion to amend should be denied where the adverse party is misled to his prejudice in maintaining his action or defense. *Makovsky,* 158 Cal. App. 2d at 744.; *see also, Stockton v. Ortiz* (1975) 47 Cal. App. 3d 183, 193, 120 Cal. Rptr. 456 (upholding denial of motion to amend because amendment would have required defendant to defend new theory in middle of trial).

Most importantly, an unpled claim should not be added unless the claim was "thoroughly explored during trial, and the theory of the trial [was] well known to court and counsel." *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal. App. 3d 1051, 1060, 235 Cal. Rptr. 813. Nothing in the record here establishes that plaintiffs' fraud claim was either "well known" to the court or counsel or "fully explored" at trial. In fact, the record is to the contrary. For instance, in the presence of plaintiffs' counsel, H&V's counsel expressly stated that the

testimony of Mr. Thompson[3] "had nothing to do with my client." (R.T., at 630.) Clearly H&V's counsel was not at that point aware of any fraud claim against H&V. Likewise, plaintiffs made no mention of a fraud claim against H&V in their opening statement. In no sense was the unpled fraud claim tried with the full understanding of the parties. Code of Civil Procedure section 469 cannot be used after the fact to justify its submission to the jury.[4]

Until plaintiffs submitted their proposed special verdict form after the close of evidence, they had not introduced any evidence, filed any papers, or made any statements from which H&V could have surmised that fraud was a claim it needed to defend. H&V was prejudiced in that it had no notice that it should defend a fraud claim, was not aware that it should defend a fraud claim, and therefore did not defend the claim. The submission of the claim, the jury's finding of fraud, and ultimately the imposition of liability for compensatory and punitive damages was therefore a miscarriage of justice.

---

[3] Mr. Thompson was the Young & Rubicam executive upon whom plaintiffs' counsel relied heavily to establish the defendant's fraud in her closing argument. (R.T., at 2095-98.)

[4] It bears mentioning that plaintiffs never made a motion to conform to the evidence pursuant to CCP § 469, and no amendment was ever allowed.

4. The Fraud Claim Should Not Have Been Submitted to the Jury as There Was Insufficient Evidence from Which a Jury Could Conclude That H&V Committed Fraud.

a. H&V made no representations to the plaintiffs.

The fraud claim against H&V should not have been submitted to the jury, as no evidence existed upon which a jury reasonably could find that H&V committed fraud.

An essential element of a fraud claim is that the defendant must have made a misrepresentation as to a material fact. *Williams v. Wraxall* (1995) 33 Cal. App. 4th 120, 132, 39 Cal. Rptr. 2d 658. For the representation to be actionable, the plaintiff must also prove that he relied on the misrepresentation to his detriment. *Id.* Here, however, there was no evidence that either H&V or Specialties made any representation to Milton or Shirley Horowitz or the consuming public. In fact, as a component supplier, neither H&V nor Specialties had any communication with any persons in the public who purchased Kent cigarettes, and there was no evidence to the contrary. Because plaintiffs completely failed to prove this element of fraud on the part of H&V, the claim should not have been submitted to the jury.

b. Plaintiffs' argument that H&V was vicariously liable for Lorillard's advertisements was neither pled nor supported by the evidence.

When the question of submitting fraud to the jury arose in the context of H&V's motion for nonsuit (and again with respect to H&V's motion for a new trial), plaintiffs implicitly

conceded that they had no evidence that H&V itself committed fraud. Instead, they argued that their fraud claim against H&V was premised on Specialties's relationship with Lorillard, which plaintiffs characterized as a "joint venture." (R.T., at 2051-52, 2074; C.T., at 2398-99.) Specifically, plaintiffs contended that the supply agreement between Specialties and Lorillard established a joint venture and this made H&V responsible for Lorillard's statements. *Id.* This was the first time in the case that H&V heard this joint venture argument.

The plaintiffs' last minute addition of this new theory resulted in error, because H&V never had an opportunity to introduce evidence to rebut the joint venture theory. As with fraud in general, the notion that plaintiffs were relying on a "joint venture" theory to establish H&V's liability for fraud first came up after the close of the evidence. (R.T., at 2050-52). H&V, having no reason to know it was defending this claim, did not affirmatively seek at trial to show there was no joint venture. The submission of a joint venture theory of fraud under these circumstances constituted a miscarriage of justice.

Plaintiffs compounded the error by avoiding the well-established legal test for joint venture and substituting their own, lesser standard in closing argument. Under California law, "[a] joint venture exists when there is an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." *Resolution Trust Corp. v. BVS Development, Inc.* (9th Cir. 1994) 42 F.3d 1206, 1214 (internal citations omitted) (finding that relationship between lender and borrower was not a joint venture because lender did not have joint control or interest in profits and losses of enterprise). For a joint venture to exist.' there must be a right of joint participation in the management and control of the business. *Kaljian*

v. *Menezes* (1995) 36 Cal. App. 4th 573, 586, 42 Cal. Rptr. 2d 510. "Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer." *Id.* at 586 (*quoting Bank of California* v. *Connolly* (1973) 36 Cal. App. 3d 350, 364, III Cal. Rptr. 468). The fact that the parties may have plans in common is also insufficient. *Christensen* v. *Superior Court* (1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 181. Indeed, an assertion of some type of joint endeavor between H&V and Lorillard, as a basis for asserting personal jurisdiction over H&V, has been rejected by the Fourth Circuit Court of Appeals. *Lesnick v. Hollingsworth & Vose Co.* (4th Cir. 1994) 35 F.3d 939, 941.

The requirements for the imposition of joint enterprise liability are reflected in the approved jury instructions:

> A joint enterprise is a relationship which arises from an agreement between two or more persons to undertake some common objective for the benefit of all in pursuit of which each is authorized to act for the other[s], and each of whom has an equal right to control, that is, to direct and govern the conduct of each other with respect to the common undertaking. Such an agreement may be expressed in words or implied from the circumstances.

BAJI 13.40. Had plaintiffs pled their joint venture theory and had plaintiffs offered sufficient evidence on the issue, BAJI 13.40 would have been given. The jury would then have re-

ceived guidance as to the applicable legal standard to determine if a joint enterprise existed.[5]

But this did not occur. Instead, the question of whether a joint venture existed was presented to the jury wholly in the abstract, without any guidance. Plaintiffs' counsel then exploited this error, creating a new standard by instructing to the jury in closing argument that they should impose liability jointly — *as to all claims* — because "these two companies were in this thing together." (R.T., at 2087.) In sum, plaintiffs' counsel was permitted to proceed on a theory of joint venture or joint enterprise liability despite her failure to plead that theory, to avoid the appropriate jury instruction, and to substitute her own instruction to the jury using an incorrect standard. Had the trial judge allowed the jury to consider only claims that were pled — or even properly added by amendment under Code of Civil Procedure section 469 — then this would not have occurred. Instead, this error resulted in a miscarriage of justice that taints this entire case.

Notwithstanding the due process and notice issues, there was no evidence presented at trial that Lorillard and Specialties had a joint venture as properly defined in California law for the manufacture and sale of Kent cigarettes. The supply agreement — the only evidence of the nature of the Lorillard/Specialties relationship and the parties' intent — documented a common arrangement between a component supplier and a manufacturer, not a joint venture. As one court noted in a case directly on point:

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[5] It bears mentioning that H&V's counsel, even without notice of the joint venture theory, attempted to direct the trial courts attention to this legal standard, in arguing the motion from non-suit as to fraud. (R.T., at 2072.) The trial court, however, without due consideration, denied the motion for non-suit. (R.T., at 2074.)

> [A] component part manufacturer's profit from the sale of its components is not a joint venture interest in the seller's profits from the sale of the assembled product. If the rule were otherwise, cooperation between businesses, suppliers and customers would carry a new scenario of legal risks and costs.

Nature's Share, Inc. v. Kutter Products, Inc. (D. Kan. 1990) 752 F.Supp. 371, 383. The agreement provides that the parties would share their "know how," their relevant inventions, and the facilities and equipment used for manufacturing the filter media. The agreement pertains only to the manufacture of the filter media — not the manufacture, packaging, distribution or marketing of Kent cigarettes.

Moreover, paragraph 25 of the agreement provides:

> This agreement shall in no way be construed as creating the relationship of principal and agent or partnership or joint venture between the parties. Neither party shall pledge or have the right to pledge the credit of the other, or be responsible for the obligations or acts of the other.

Because the existence of a joint venture depends upon the intent of the parties, courts look to such written statements in determining whether a joint venture exists. *Gurewitz* v. *Kinder* (1979) 96 Cal. App. 3d 460, 465, 158 Cal. Rptr. 102. Here, plaintiffs' theory that H&V is indirectly or vicariously responsible for Lorillard's advertising is based solely on a written agreement which unambiguously repudiates that very theory. The theory was neither pled nor proven and does not amount to sufficient evidence to support the jury's findings of fraud.

Had plaintiffs genuinely wished to proceed on a joint venture theory against H&V, plaintiffs would have needed evidence sufficient to satisfy the elements set out in BAJI 13.40, proving that Specialties and Lorillard had "an equal right of control to direct and govern the other with respect to the common undertaking." BAJI 13.40. In effect, plaintiffs should have had to prove that Specialties and Lorillard had this "equal right of control" over the sale and marketing of Kent cigarettes. The notion so stretches common sense as to be absurd. Indeed, that is why there is no evidence, including the Agreement between the parties, creating this equal right of control. No evidence existed to create joint liability in this case, and the verdict (based on plaintiffs' counsel's lesser standard that "they were in it together") should be reversed in its entirety.

5. The Jury Instructions and Special Verdict Form Should Not Have Directed the Jury to Consider Whether H&V Committed Fraud.

It is error to instruct the jury on a theory of liability when there is no evidence to support it. *LeMons v. Regents of Univ. of California* (1978) 21 Cal. 3d 869, 875, 148 Cal. Rptr. 355, 582 P.2d 946. Erroneous jury instructions are grounds for reversing a judgment on appeal when it is reasonably probable that the defendant would have obtained a more favorable result were it not for the error. *Kaljian v. Menezes* (1995) 36 Cal. App. 4th 573, 589, 42 Cal. Rptr. 2d 510. In *LeMons*, the court reversed a judgment due to an erroneous contributory negligence instruction which was not supported by the evidence. 21 Cal.3d at 876. Even though it was impossible to tell whether the general verdict was based on the improper instruction or on a finding that the defendant was not negligent, the court reversed the judgment. "In such circumstances, this court should not speculate upon the basis of the verdict." *Id.* at 876.

Here, the trial court instructed the jury about the elements of a fraud claim and concluded by saying that "[u]nless otherwise stated, the instructions apply to the case of each defendant." (R.T., at 2232.) It should have given the opposite instruction — that the fraud instructions do *not* apply to the case of each defendant — since there was no fraud claim against H&V in the case. Likewise, the special verdict form should not have included H&V in the 15 questions about the elements of various types of fraud claims. *See Pearson Ford Co. v. Ford Motor Co.* (1969) 273 Cal. App. 2d 269, 277, 78 Cal. Rptr. 279 (judgment reversed in case where special interrogatory so defectively worded it deprived defendant of fair hearing).

6. Submitting the Fraud Claim to the Jury Resulted in a Miscarriage of Justice Because of the Fraud and Joint Enterprise Claim's Impact on All Other Claims Including That For Punitive Damages.

Submitting the fraud claim to the jury on a joint venture theory, even though neither the claim itself nor the theory of liability had ever been raised, resulted in a miscarriage of justice under Article VI, Section 13 of the California Constitution. Cal. Const. art. VI, § 13. This action of the trial court distorted consideration of all evidence as to H&V, depriving it of a fair trial. Moreover, once the jury found that H&V was liable on the fraud claim — a claim which never should have been submitted — the finding of punitive damages was a foregone conclusion given that "fraud" is one of the criteria for a punitive award.

The court instructed the jury about the standard for punitive damages, i.e., that if they found that plaintiffs suffered actual injury, harm or damage caused by Kent cigarettes, they must

also decide "whether by clear and convincing evidence . . . there was oppression, malice or fraud . . ." (R.T., at 2230.) After finding that the elements of the improperly submitted fraud claims were satisfied, the jury had no choice but to answer "yes" to the special verdict form's question whether H&V's conduct constituted "oppression, malice *or fraud*." Had the court entered a nonsuit on the fraud claim and removed H&V from the corresponding special verdict questions and otherwise refused to let plaintiffs go forward on the unpled claims and theories, the jurors likely would have found that the criteria for punitive damages were not met. In light of the prominence of the fraud claims in the instructions and special verdict form, it is a virtual certainty that the findings on the fraud claims substantially affected the findings on punitive damages.

When an award of punitive damages may have rested on an improperly submitted theory, the award should be reversed. *See, e.g., Robertson Oil Co., Inc. v. Phillips Petroleum Co.* (8th Cir. 1989) 871 F.2d 1368, 1376. That is precisely what occurred here — after being instructed on plaintiffs' fraud theory, the jury was asked to determine whether to award punitive damages based on "fraud." Particularly in light of its constitutional dimension, the trial court's error tainted this entire inquiry and requires that the verdict below be reversed.

Plaintiffs will likely argue that the "general verdict rule" under California law (providing that a general verdict will be sustained in a case with multiple counts if any one count is supported by substantial evidence and is unaffected by error) governs here and requires upholding the verdict. *See, e.g., Tavaglione v. Billings* (1993) 4 Cal. 4th 1150, 1157, 17 Cal. Rptr. 2d 608, 847 P.2d 574. The "general verdict rule," however, is not applicable to the punitive damages verdict here. First, the jury rendered a special verdict, not a general verdict. In its answers to questions 8 through 20 in the special verdict

form, the jury specifically found H&V liable for fraud. (C.T., at 1588-93). Thus, the assumption underlying the "general verdict rule," *i.e.*, "that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error," is proven incorrect in this instance by the special verdict. *Id.* (*quoting McCloud v. Roy Riegels Chemicals* (1971) 20 Cal. App. 3d 928, 936, 97 Cal. Rptr. 910). Here the punitive damage award was based on a claim that should never have gone to the jury. The result was a miscarriage of justice.

Second, the "general verdict rule" has not been held to require upholding a punitive verdict based on fraud where an underlying fraud claim was improperly submitted to the jury (with fifteen special questions no less). Nothing in that rule requires the unjust result obtained here. The court, having allowed the fraud claim to go to the jury on the basis that the defendants "were in this thing together" and in violation of H&V's due process rights has riddled the verdict with error, including the punitive damages verdict.

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No. 97-1321

In The

Supreme Court of the United States

October Term, 1997

HOLLINGSWORTH & VOSE COMPANY,

Petitioner,

v.

MILTON HOROWITZ and SHIRLEY HOROWITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HARRY F. WARTNICK, ESQ.
MADELYN J. CHABER
WARTNICK, CHABER, HAROWITZ, SMITH & TIGERMAN
101 California Street, Suite 2600
San Francisco, CA 94111
Telephone: (415) 986-5566

DANIEL U. SMITH, ESQ.
Counsel of Record
TED W. PELLETIER, ESQ.
LAW OFFICE OF DANIEL U. SMITH
P. O. Box 278
Kentfield, CA 94914
Telephone: (415) 461-5630

Counsel for Respondents Milton and Shirley Horowitz

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether Petitioner Hollingsworth & Vose fails to invoke this Court's jurisdiction because it fails to demonstrate that the California Court of Appeal's decision below decided a federal question.

II. Whether the California Court of Appeal's factual determination that the Respondents' complaint sufficiently pled a fraud cause of action against Petitioner fails to present an important federal question that either must be settled by this Court or conflicts with other court decisions.

III. Whether the state court properly affirmed the judgment against H&V because H&V received adequate notice of the fraud claim and, in any event, any error failed to prejudice H&V.

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JURISDICTION

Respondents Milton Horowitz and Shirley Horowitz (Horowitz) dispute Petitioner Hollingsworth & Vose Company's (H&V) claim that this Court has jurisdiction over this matter under 28 U.S.C. section 1257. H&V fails to demonstrate that the California courts decided any federal questions and thus fails to invoke the jurisdiction of this Court. Accordingly its Petition should be rejected. *See* Reasons For Denying The Writ, Section I, *post*.

STATEMENT OF THE CASE

I. Introduction.

H&V's Petition is fundamentally flawed because it mischaracterizes the holding of the California Court of Appeal decision from which its Petition is taken. H&V asserts that the state court "dispense[d] with a long-standing rule of state civil procedure" to hold that "a trial judge may properly submit an unpled and untried fraud claim to the jury." Petition at p. i (Questions Presented); *see* Petition at p. 22 (asserting appellate court error in "abrogating established rules of procedure").

The court below *did not* "dispense" with a state pleading rule and *did not* hold that a trial judge may submit an unpled fraud claim to a jury. On the contrary, the state court affirmed the trial court finding that, *under the pleading rules* of California civil procedure, Horowitz "sufficiently ple[d] a cause of action for fraud against H&V." Petition, Appendix A at p. 29a.

H&V's mischaracterization of the state court's holding permeates its Petition, which must be denied for three reasons:

(1) H&V fails to invoke this Court's jurisdiction by failing to demonstrate that the state court decided *any* federal question whatsoever.

(2) H&V fails to demonstrate that the state court decided an "important" federal question that either must be settled by this Court or conflicts with other law.

(3) The state court properly affirmed the trial court judgment because (a) H&V received adequate notice of Horowitz' fraud claim, and (b) any trial court error failed to prejudice H&V because the judgment is independently supported by jury findings that H&V was liable on four other causes of action.

II. Factual Background.

In the early 1950's, H&V and P. Lorillard Company (Lorillard), defendants below, jointly manufactured cigarette filters containing 30% crocidolite asbestos, the most deadly asbestos in the world. RT 874-875, 896-897, 933-994, 996-997, 1513-1515. H&V and Lorillard entered into a "Supply Agreement" under which H&V supplied Lorillard with asbestos-laden filter material, which Lorillard cut and placed on tobacco rods to form filtered cigarettes. Exh. 105; RT 996:10-24; 1513:22-24. H&V and Lorillard also agreed to share in all aspects of this joint

cigarette production, including manufacturing, marketing, shared technology, patent ownership, and shared liability. Exh. 105. From 1952 to 1956, defendants manufactured and marketed these asbestos-filtered cigarettes nationally as "Kent" brand cigarettes.

Both H&V and Lorillard knew, however, that their Kent filters released deadly asbestos fibers into the smoke that Kent smokers inhaled into their lungs. Exhs. 42, 42A-BB, 43, 43A-O (Lorillard and H&V correspondence admitting asbestos release). But defendants callously mounted an aggressive advertising campaign that (1) falsely claimed that the filters were "safe," "harmless", and offered the "greatest health protection" in history, but (2) *never* informed the public that the filters contained (let alone released) asbestos. *See* Exhs. 16A-M, 17A-L, 18A-J (Kent advertisements that do not mention asbestos); Deposition of William Thompson 42:17-43:5; 46:9-10. In fact, defendants boasted that Kent filters contained a "secret mineral" and "an amazing mineral filtering material," without disclosing that the mineral was asbestos. Exhs. 16D, 16E, 185; RT 1961:16-1962:3.

Defendants targeted this advertising at professionals over 30 years old, who assumedly would respond to health claims and be willing to spend extra money for the asserted "health protection." Thompson Depo. 145:9-20.

One of defendants' targets was Dr. Milton Horowitz, who in 1952 was a 29 year-old professional psychologist. Defendants' fraudulent advertising claims that Kent filters were "safe" and offered "health protection" induced Dr. Horowitz to smoke Kents from 1952 to 1956 and beyond. RT 1112:14-1113:7.

In 1994, Dr. Horowitz was diagnosed with terminal mesothelioma, a cancer of the lung lining invariably caused in the United States by asbestos exposure. RT 524:14-18. Expert testimony established that asbestos released from Defendants' Kent cigarettes caused Dr. Horowitz' mesothelioma, RT 512:15-21, 529:2-5, 927:6-8, 928:18-21, killing him shortly after trial in 1996.

III. State Court Proceedings.

Dr. Horowitz and his wife, Shirley Horowitz, sued H&V and Lorillard (and other defendants) in California Superior Court, alleging causes of action for negligence, three forms of strict products liability,[1] enterprise liability, false representation, loss of consortium, and fraud, and requesting compensatory and punitive damages. Petition, Appendix D at pp. 49a-66a. In the complaint, Horowitz alleged the fraud cause of action against Lorillard only, but alleged the false representation and punitive damages causes of action against both H&V and Lorillard. *Id.* at pp. 58a-66a. The punitive damages cause of action incorporated the fraud cause of action by reference and alleged that H&V intentionally concealed its knowledge of the "high risk of injury or death" from

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[1] California recognizes three types of causes of action for strict products liability: (1) consumer expectation (product fails to perform as safely as reasonable consumer would expect), (2) risk/benefit (product's risks outweigh product's benefits), and (3) failure to warn (manufacturer failed to warn adequately of product's inherent dangers). *Anderson v. Owens-Corning Fiberglas Corp.*, 281 Cal.Rptr. 528, 532-533, 53 Cal.3d 987, 995 (Cal. 1991); *Barker v. Lull Engineering Co.*, 143 Cal.Rptr. 225, 234, 20 Cal.3d 413, 426-427 (Cal. 1978).

asbestos and "consciously and actively concealed and suppressed" that knowledge from the public. *Id.* at pp. 44a-46a.

Once Horowitz learned that H&V and Lorillard had agreed in the 1950's to share in all aspects of manufacturing and marketing Kents, he informed H&V several times, without objection, that he was asserting the fraud claim against it.

First, Horowitz told H&V in a pre-trial brief that he was making a punitive damages claim "against both Lorillard and Hollingsworth & Vose based upon their malicious *and fraudulent* conduct." CT 2396:7-11 (emphasis added). H&V failed to oppose this assertion either before or during trial.

Second, on the first day of trial, before jury selection, Horowitz' counsel informed the court and opposing counsel that he was proceeding "on fraud and misrepresentation against them [both H&V and Lorillard]." RT 9:15-21. H&V failed to object.

Third, during opening statement Horowitz' counsel repeatedly announced to the jury that Horowitz was pursuing a fraud claim against H&V, again without objection. RT 358:17-24 ("This is a case about the big lie that *these companies* told . . . in *their* advertising); RT 375:15-27 ("The evidence will show that *the defendants* are responsible . . . because *they* fraudulently, falsely and misleadingly advertised this product as pure, safe, harmless and dust-free."); RT 383:14-18 ("And we will ask you at

the end of this case to award punitive damages . . . for the fraud that *they* committed.").[2]

The jury found both H&V and Lorillard liable on every cause of action submitted to it – negligence, all three forms of strict products liability, and fraud – and awarded Horowitz $1.3 million in compensatory damages. Petition, Appendix G at pp. 78a-90a. The jury also found that both defendants committed "malice, oppression or fraud" and accordingly assessed punitive damages of $560,000 against Lorillard and $140,000 against H&V. *Id.* at pp. 87a-89a.

The California Court of Appeal affirmed the judgment against H&V and Lorillard in all respects. Petition, Appendix A at pp. 1a-32a. The California Supreme Court denied discretionary review of the appellate court decision. Petition, Appendix B at p. 33a.

REASONS FOR DENYING THE PETITION

I. H&V FAILS TO INVOKE THE JURISDICTION OF THIS COURT.

This Court should reject H&V's Petition because H&V fails to invoke the jurisdiction of this Court.

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[2] H&V thus errs when it claims to this Court that "[a]fter the evidence had closed, [Respondents] asserted for the first time a fraud claim against H&V which [they] neither pled in their complaint nor raised at any point in the pre-trial or trial proceedings." Petition at p. 3.

H&V asserts jurisdiction over the "judgment of the Court of Appeal of California" under 28 U.S.C. section 1257. Petition at p. 2.

Section 1257 authorizes this Court to review the final judgment of a state's highest court only when that judgment *decides* a substantial federal question. This Court's jurisdiction is not invoked here because the California Court of Appeal *did not decide* a federal question.

The state decision itself did not discuss or decide *any* federal question. *See* Petition, Appendix A, pp. 1a-32a. Regarding H&V's claim that Horowitz failed to allege a fraud cause of action against it, the state court discussed no federal law and held that Horowitz' complaint "sufficiently pleads a cause of action for fraud against H&V" under California law. Id. at p. 29a (citing California case law).

H&V may contend that it raised a federal due process question with the state courts in its appellate brief. *See* Petition, Appendix H at pp. 93a-94a. But because the state court "failed to pass upon [the] federal question," this Court *"assume[s]* that the omission was due to want of proper presentation in the state courts, unless the [Petitioner] in this Court can *affirmatively show* the contrary." *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354 (1969) (emphasis added).

A Petitioner must make this showing by specifying in the "Statement of the Case" of its Petition (1) the "stage in the [state] proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were *raised*," (2) the method or manner of raising them and the way in which

they were passed on by those courts," and (3) "pertinent quotations of specific portions of the record . . . , with specific reference to the places in the record where the matter appears, so as to *show* that the federal question was *timely and properly raised* and that this Court *has jurisdiction* to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g)(i) (emphasis added).[3]

H&V fails to meet its burden of demonstrating that it raised in the state courts the federal constitutional issue it now asserts. H&V appends an excerpt of its Opening Brief in the state court of appeal, in which it asserted with little analysis that the trial court's submission of the fraud claim against H&V to the jury "violated the due process guaranty of the Fourteenth Amendment to the United States Constitution." Petition, Appendix H at p. 93a. This is insufficient, however, to invoke this Court's jurisdiction because H&V fails to *show* that it *properly* raised this issue in the state court of appeal.

In fact, H&V failed to raise properly in the court of appeal its asserted constitutional issue. In California civil cases, "constitutional questions not raised in the trial court are considered waived" on appeal. *Hepner v. Franchise Tax Bd.*, 61 Cal.Rptr.2d 341, 52 Cal.App.4th 1475, 1486 (Cal.Ct.App. 1997).[4] H&V *never* raised in the trial

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[3] All further references in this Opposition Brief to "Rule" are to the Supreme Court Rules unless specified otherwise.

[4] *Accord In re Frederick B.*, 237 Cal.Rptr. 338, 192 Cal.App.3d 79, 90 (Cal.Ct.App. 1987); *Selleck v. Globe International, Inc.*, 212 Cal.Rptr. 838, 166 Cal.App.3d 1123, 1132 n.5 (Cal.Ct.App. 1985); *In re Marriage of Fuller*, 210 Cal.Rptr. 73, 163 Cal.App.3d 1070,

court the federal constitutional issue that it tried to raise on appeal and asserts here. Petition, Appendix E at pp. 67a-74a (H&V's oral motion for nonsuit on fraud claim, no constitutional issue raised); Appendix A to this Brief in Opposition, pp. App. 1-App. 21 (CT 2082-2097) (H&V's motion for new trial, no constitutional issue raised); Appendix B at pp. App. 22-App. 28 (CT 2459-2463) (H&V's new trial reply brief, no constitutional issue raised). Thus H&V was barred from raising its asserted federal issue in the state appellate court.

Because the state court of appeal was completely silent on H&V's asserted federal issue, this Court assumes that this silence was due to H&V's procedural error in raising the federal issue. *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66 (1945); *Street v. New York, supra*, 394 U.S. at 582.

Thus the state appellate court opinion from which H&V takes its Petition did not decide a federal question. H&V thus fails to invoke this Court's jurisdiction, and this Court accordingly should reject H&V's Petition.

II. H&V MERELY ASSERTS STATE COURT ERROR AND FAILS TO DEMONSTRATE A "COMPELLING REASON" WHY THIS COURT SHOULD GRANT CERTIORARI.

Even if this Court concludes that, despite H&V's defective showing, the state court "decided" a federal question and invoked this Court's jurisdiction, H&V's Petition should be denied because H&V fails to show a

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1076 (Cal.Ct.App. 1985); *Fleming v. Safeco Ins. Co.*, 206 Cal.Rptr. 313, 160 Cal.App.3d 31, 43 (Cal.Ct.App. 1984).

"compelling reason" why this Court should grant certiorari. *See* Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

H&V fails to demonstrate either of the bases for a grant of certiorari from a state court decision, that either (1) the state decision raises an "important question of federal law" that this Court must settle, or (2) the state decision "has decided an important federal question in a way that conflicts" with a decision of either this Court, a United States court of appeals, or another state court of last resort. *See* Rule 10(b) and (c). At most, H&V asserts that the California Court of Appeal *misapplied* California's "properly stated" pleading rules, and review by this Court is thus not warranted.

A. H&V fails to demonstrate that the *unpublished* state court decision raises an "important question of federal law" that this court must decide.

This Court should deny H&V's Petition because H&V fails to raise an "important question of federal law" that this Court must decide.

H&V asserts that the state decision raises "important questions" about the "continued critical importance of due process notice" to mass tort defendants, "particularly in cases involving allegations of fraud," Petition at p. 4. H&V errs.

First, the state court's decision cannot affect any other litigants because it is *unpublished*. To warrant review by this Court, a federal question must be important "to the public as distinguished from" the particular

"parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422 (1923). The state court decision here, however, is important *only* to these parties because it is an unpublished opinion. Petition, Appendix A at p. 1a. In California, appellate court decisions that are not published may not be "cited or relied on" in "any other action." Cal. Rule of Court 977(a). The unpublished decision below thus has *no effect* on any other litigation anywhere. Hence, H&V's claim that "the decision below will have substantial and deleterious ramifications far beyond the particular parties and facts at issue in this case," Petition at p. 22, is simply wrong.

Second, although H&V contends that the decision below has "serious ramifications" for other defendants in "mass tort litigation," Petition at p. 2, H&V admits that this case is *atypical* and distinct from most mass tort cases, involving an "atypical" defendant, "atypical claims," and "unique claims" that are "entirely distinct from the typical claims of [asbestos] plaintiffs." Petition at p. 12. H&V fails to show how the state court's decision in this atypical case can or will have any effect on "typical" cases.

Third, even if this "atypical" case was published, it could not affect other litigants because it is decided *on its facts*. The appellate court affirmed the trial court factual finding that, under California pleading rules, H&V received sufficient notice of the fraud claim to submit the claim to the jury. Petition, Appendix A at p. 29a. This Court does not grant certiorari "to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496 (1925), particularly fact findings made by the trial court and affirmed by the appellate

court below. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535 (1949) (this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"). This Court thus should reject H&V's invitation to overturn the state trial and appellate court findings that H&V received sufficient notice of Horowitz' fraud claim against it to satisfy California's fraud-pleading requirements. *See* Petition, Appendix A at p. 29a.

Because H&V fails to raise any "important" federal questions affecting other litigants, its Petition should be denied.

B. H&V fails to demonstrate that the state court decision conflicts with decisions of this Court, the United States court of appeals, or any other state's court of last resort.

H&V fails to justify review by this Court because it fails to establish that the decision below "conflicts" with other decisions.

H&V erroneously asserts that the decision below "conflicts with this Court's decisions" requiring notice to defendants because it "sanctions the trial judge's submission of [the] fraud claim [to the jury] *even in the absence of adequate notice.*" Petition at p. 4 (emphasis added).

H&V errs because the decision below *did not* "sanction" claims without adequate notice to the defendant. On the contrary, the state court of appeal (1) restated California rules *requiring* that a defendant receive notice

of claims against it, and (2) affirmed the trial court finding of fact that H&V received adequate notice under these rules. Petition, Appendix A at pp. 28-29.

H&V does not argue that California's statutory pleading requirements are invalid or violate due process in any way. In fact, H&V concedes that "established" and "well-settled" California pleading rules protect defendants' due process rights. Petition at p. 4 (asserting that the courts below "arbitrar[ily]" failed to follow "*established* rules of state court procedure" and ignored "a *well-settled* state procedural rule which requires that claims of fraud be pled with specificity"). H&V even demonstrates that California's "settled" pleading requirements suffice to "provide an adversary with adequate notice when alleging a fraud claim." Petition at pp. 14-15.

Rather than showing a "conflict" between California pleading rules and federal, constitutional notice requirements, H&V demonstrates that California's rules *match* federal rules protecting due process. Petition at pp. 13-15. For example, H&V shows that "settled" California rules require specific fraud pleadings to provide the "notice to the defendant" required by decisions of this Court and lower federal courts. Petition at pp. 13-15 and n. 1 (favorably comparing pleading rules in California cases *Goldrich v. Natural Y Surgical Specialties, Inc.*, 31 Cal.Rptr.2d 162, 168, 25 Cal.App.4th 772, 782-783 (Cal.Ct.App. 1994) and *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 672, 35 Cal.3d 197, 216 (Cal. 1983), with rules stated in various federal cases).

After conceding that California pleading requirements satisfy federal due process requirements of notice,

H&V merely asserts that the state court *misapplied* California's constitutional rules to these facts. Petition at pp. 15 (state court "disregard[ed]" California's valid rules), 17 (state court's factual finding "cannot be reconciled" with state's valid rules). However, a certiorari petition is "rarely granted when the asserted error consists of erroneous factual findings or the *misapplication of a properly stated rule of law.*" Rule 10 (emphasis added).

The court below did not abrogate California's constitutional pleading requirements or declare that a defendant can be sued in California without notice and an opportunity to be heard. Such a ruling *would* "conflict" with the rulings of this and other courts. On the contrary, the court below *reaffirmed* California's pleading rules, which H&V admits are consistent with this Court's constitutional requirements, and then *applied* those rules to the facts. H&V's argument that the court applied California's constitutional rules erroneously does not warrant review by this Court.

Because H&V fails to demonstrate a compelling reason for review, this Court should deny H&V's Petition.

III. THE COURT OF APPEAL PROPERLY AFFIRMED THE JUDGMENT AGAINST H&V.

H&V's Petition should be denied finally because the state court of appeal properly affirmed the judgment against H&V. First, the courts below properly found that H&V had notice of the fraud claims against it. Second, even if the trial court erred in submitting the fraud claim to the jury, the court of appeal properly affirmed because

the judgment against H&V was supported by jury verdicts on four other causes of action, and thus H&V was not prejudiced in any way by the error asserted in its Petition.

A. The Court of Appeal properly affirmed the trial court finding that H&V had adequate notice of the fraud claim against it.

The courts below properly found that H&V had sufficient notice of the claims against it to satisfy due process.

Horowitz initially asserted the fraud cause of action against only Lorillard, who initiated the fraudulent advertising campaign that ensnared Dr. Horowitz with claims that asbestos-laden Kent cigarettes were "safe" and "harmless" and offered "health protection." Petition, Appendix D at pp. 63a-66a. Horowitz then asserted fraud against H&V when he learned that H&V and Lorillard shared all aspects of Kent cigarette manufacture and marketing. H&V received adequate notice of this fraud claim.

First, the complaint put H&V on notice that Horowitz accused H&V of fraudulent misrepresentations and fraudulent concealment. The punitive damages cause of action against both H&V and Lorillard (1) incorporated the allegations that Kent's marketing advertisements were fraudulent, and (2) specifically accused H&V of "marketing" asbestos-laden Kents while "intentionally" concealing its knowledge that they were deadly, with "conscious disregard" for consumers' safety. *Id.* at pp. 60a-61a. Moreover, the fourth cause of action for "False Representation" specifically alleged that H&V "marketed" and "offered for sale" asbestos-laden Kents with

"false and untrue" representations that Kents were "safe", and these "false representations" injured Dr. Horowitz. *Id.* at pp. 58a-59a.

Second, Horowitz clarified any possible ambiguity in his claims against H&V by repeatedly notifying H&V before and during trial that he accused H&V of fraud. In a pre-trial brief, Horowitz notified the court that he was suing H&V for its "*fraudulent* conduct." CT 2396:7-11 (emphasis added). On the first day of trial, Horowitz asserted that he was proceeding "on fraud and misrepresentation against them [both H&V and Lorillard]." RT 9:15-21. In opening statement, Horowitz repeatedly announced to the jury he was pursuing a fraud claim against H&V based on Kent advertising. RT 358:17-24 ("these companies" told a "big lie" in "their" advertising); RT 375:15-27 ("defendants . . . fraudulently, falsely and misleadingly advertised" Kents); RT 383:14-18 (requesting punitive damages for "the fraud that they committed."). H&V failed to object to *any* of these pretrial and trial assertions, each of which notified H&V unambiguously that Horowitz was proceeding against H&V for its fraud.

Thus, the courts below properly found that H&V had notice that it was being sued for fraud.

B. The Court of Appeal properly affirmed the judgment because H&V was not prejudiced by the asserted pleading error.

Even if there was a technical defect in Horowitz' fraud claim against H&V, the Court of Appeal properly

affirmed the trial court judgment because H&V was not prejudiced.

First, the jury found H&V liable on four other causes of action besides fraud, including negligence and all three forms of strict products liability. Petition, Appendix G at pp. 79a-86a. Similarly, the jury assessed punitive damages based on H&V's malice, oppression, *or* fraud. *Id.* at pp. 87a-88a. If a California jury finds a defendant liable on several causes of action, the court of appeal must sustain the judgment if "*any*" cause of action is "supported by substantial evidence and is unaffected by error, despite possible insufficiency . . . as to the remaining counts." *Tavaglione v. Billings*, 17 Cal.Rptr.2d 608, 613, 4 Cal.4th 1150, 1157 (Cal. 1993). Thus, even if error affected the fraud claim, the appellate court properly affirmed the judgment based on the other error-free claims that were supported by the evidence.

Second, H&V failed to demonstrate to the court of appeal that it would have presented any different evidence had it had better notice of the fraud claim. In fact, H&V contended on appeal that "no evidence existed" that H&V committed fraud, thus asserting that it had presented a complete defense to the fraud claim. Petition, Appendix H at p. 98a. H&V thus failed to show how its defense would have differed if the complaint had specifically alleged fraud against it.

H&V thus failed to demonstrate that it would not have received *exactly* the same judgment absent the asserted error. Under the California Constitution and California law, an appellate court cannot reverse a judgment based on error unless it is "probable" that the jury would

have reached a different verdict absent the error. California Constitution, Art. VI, § 13; Cal. Code of Civil Procedure § 475. Under these authorities, the state appellate court properly affirmed the trial court judgment because it was not probable that the judgment against H&V would have differed in any way absent the asserted error in submitting the fraud claim to the jury.

CONCLUSION

H&V continues to cling to the desperate hope that it will not be held accountable for its appalling conduct in placing deadly asbestos in a cigarette filter and then marketing the filter to the late Dr. Horowitz and millions of other consumers as "safe" and "harmless" and offering "health protection," despite H&V's specific knowledge that the filter released asbestos into smokers' lungs.

H&V's Petition must be denied for three reasons.

First, H&V fails to invoke this Court's jurisdiction because it fails to show that the California courts decided *any* federal question. This Court should reject H&V's Petition for this reason.

Second, even if this Court has jurisdiction, H&V fails to demonstrate that review by this Court is warranted. H&V raises neither an "important" federal question with an effect beyond these parties nor a "conflict" between California law and federal due process protections. H&V concedes that California's "well-settled" law protects defendants' due process rights but merely argues that the courts below misapplied the constitutional state rules.

Third, even if the state courts committed error, H&V fails to demonstrate that the error tainted the judgment in any way. The trial and appellate court findings of fact that H&V received notice of the fraud claim are supported by the evidence. Moreover, H&V was not prejudiced by any error because the judgment was independently supported by H&V's liability on four other causes of action.

Accordingly, H&V's Petition should be denied.

Dated: March 16, 1998.

Respectfully submitted,

LAW OFFICE OF DANIEL U. SMITH

DANIEL U. SMITH
Attorney for Respondents

APPENDIX A

DONALD F. ZIMMER, JR (State Bar No. 112279)
CYNTHIA C. ROENISCH (State Bar No. 151908)
PREUSS WALKER & SHANAGHER
595 Market Street, 16th Floor
San Francisco, California 94105
Telephone: (415) 978-2600
Facsimile: (415) 978-2613

ANDREW J. McELANEY, JR.
STEPHEN J. BRAKE
DANIEL R. HARRIS
NUTTER, McCLENNEN & FISH
One International Place
Boston, Massachusetts 02110-2699
Telephone: (617) 439-2000

Attorneys for Defendant
HOLLINGSWORTH & VOSE COMPANY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ Plaintiffs, v. RAYBESTOS-MANHATTAN, INC., et al. Defendants.	No. 965245 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HOLLINGSWORTH & VOSE COMPANY'S MOTION FOR NEW TRIAL** Date: November 6, 1995 Time: 2:00 p.m. Dept.: 1 (TBA) Judge: Winton McKibbon (X-5) (Filed Oct. 20, 1995)

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I.

INTRODUCTION

On September 1, 1995, the jury in the above-captioned action returned a Special Verdict in favor of plaintiffs Milton and Shirley Horowitz. Judgment was entered on September 21, 1995. By this Memorandum of Points and Authorities, Hollingsworth & Vose Company ("H&V") asks this Court to set aside the verdict and judgment entered thereon, and to grant a new trial because (1) the expert opinion evidence of Elise Comproni was admitted without sufficient foundation; (2) the weight of the evidence presented at trial was insufficient to justify a finding of negligence, and (3) the jury was permitted to deliberate on plaintiffs' fraud claims against H&V despite plaintiffs' failure to plead such claims or present any supporting evidence.

In addition, in order to avoid duplication, H&V hereby joins in Lorillard, Inc.'s Memorandum of Points and Authorities In Support of its Motion for New Trial to the extent Lorillard's Memorandum presents issues applicable to H&V. H&V specifically incorporates as though fully set forth herein Lorillard's Memorandum, Sections II and III.

Section II, addressing the insufficiency of plaintiffs' evidence that Milton Horowitz smoked "Old" Kents, is equally applicable to H&V because any claim against H&V necessitates, as a threshold requirement, a showing that Milton Horowitz smoked "Old" Kent cigarettes which employed H&V's asbestos-containing filter media. Section III, addressing plaintiffs' counsel's improper conduct, is also applicable to H&V because each of the incidents discussed involves plaintiffs' improper inferences and assertions directed against both Lorillard *and* H&V.

II.

ARGUMENT

A. The Admission of Deposition Testimony Of Elise Comproni Into Evidence Without A Legally Sufficient Foundation Was Prejudicial Error [CCP 657(1) And CCP 657(7)].

During opening statements and closing arguments, plaintiffs repeatedly referred to the deposition testimony of Elise Comproni, an inspector with the Massachusetts Department of Labor and Industries, Division of Occupational Hygiene ("DOH"). In 1991, Mr. Comproni testified via deposition that in 1953, then one year out of college with no specialized training or knowledge, he was "appalled" at the use of asbestos in Kent cigarette filter media. Despite defendants' timely objection and the undisputed testimony establishing Mr. Comproni's complete lack of qualifications to opine on the hazards of asbestos and asbestos-containing products, plaintiffs were permitted to read this testimony to the jury. Moreover, the Comproni testimony, given the prominence

placed upon it by plaintiffs' repeated references, prevented defendants from receiving a fair trial.

1. Elise Comproni Was Not Qualified To Give an Opinion Concerning the Potential Hazards of an Asbestos-Containing Filter in the Early 1950s.

When Elise Comproni visited the H&V Specialties plant in 1953, he was a recent graduate of the Plymouth State College in Plymouth, New Hampshire. (4/16/91 Deposition of Elise Comproni, at 60-61, CCR Exhibit A, Tab 1; R.T., at 1288, CCR Exhibit B, Tab 1).[1] He graduated with a bachelor of education degree, a degree one obtains before becoming a high school teacher. (Comproni Depo., at 60, CCR Exhibit A, Tab 1). He took no courses in industrial hygiene and studied nothing even remotely related to the hazards associated with asbestos. (Comproni Depo., at 62, CCR Exhibit A, Tab 1). Mr. Comproni was simply unqualified to form or give any sort of opinion regarding the potential hazards of an asbestos-containing filter in the early 1950s. Nevertheless, the Court permitted plaintiffs to read Mr. Comproni's opinion testimony to the jury:

> Q. Given your position with the Commonwealth of Massachusetts at that point, how did you react to the fact that they were putting cigarette – asbestos in the cigarette filters?

---

[1] Throughout this memorandum "R.T." refers to the Reporter's Transcript and "CCR Exhibit" refers to the exhibit attached to the Declaration of Cynthia C. Roenisch and its included tabbed attachments.

> A. Well, we were appalled at this sort of thing but it is beyond our power to do anything about that. . . .

(Comproni Depo., at 51-52, CCR Exhibit A, Tab 2; R.T., at 1322-1323, CCR Exhibit B, Tab 2).

In order to give an expert opinion, a person must have "special knowledge, skill, experience, training, or education." Evid. Code § 720(a). Plaintiffs failed to demonstrate any such knowledge, skill, experience, training, or education which Mr. Comproni held in 1953. Because he had no such contemporaneous expertise with which to give an opinion on the then-existing knowledge concerning the safety of Asbestos-containing filters, his opinion should not have been admitted.

The Court improperly permitted the opinion testimony to be read to the jury despite plaintiffs' failure to lay a proper foundation and despite defendants' timely objection:

> THE COURT: Okay. (Pause.) All right what do you want to say. I read the pages you referred to me, page 59 and 71 with respect to his experience and qualifications.
>
> MR. BRAKE: My contention was, your honor, that the opinion he gave on pages 51 and 52, he was asked about, essentially, what did you think about the fact they were manufacturing cigarette filters using asbestos? He goes on to says (sic), "we", apparently referring to himself, was appalled; went on to discuss that.
>
> My point is he is giving a scientific technological opinion there. He simply is not properly qualified to do, improper opinion testimony.

> If you read the pages to which plaintiff reference, he is one year out of Plymouth state with an education degree, just started working there.
>
> If he came in here, tried to give that opinion, you won't let him do it. It is my opinion, you shouldn't let him. . . .
>
> THE COURT: I will permit the opinion.

(R.T., at 1288-89, CCR Exhibit B, Tab 3).

2. Plaintiffs' Use of the Inadmissible Comproni Testimony Unduly Prejudiced Defendants and Prevented Defendants From Receiving a Fair Trial.

Plaintiffs repeatedly referred to Mr. Comproni's alleged assessment that, given his knowledge in 1953, he considered the use of asbestos in a cigarette filter at the time to be "appalling." Plaintiffs' counsel cited the reference in her opening statement and repeated it again in closing argument:

> And you will hear, either, hopefully from the witness stand or in the form of a deposition read to you, prior testimony taken from a [sic] Elise Comproni, who inspected that plant, who will tell you that he was appalled by what they were doing with the asbestos, something that could be inhaled into the lungs, but that he was powerless to do anything about it. And that in the 1950s. He was unwilling to champion a cause, go public with it, go to the press. He didn't have any powers, under the Massachusetts Department of Labor, to close them down. They weren't doing anything illegal.

(Plaintiffs' Opening Statement, R.T., at 363-64, CCR Exhibit B, Tab 4).

* * *

> And when Elise Comproni remember I read his deposition, inspected the H & V plant, his testimony was that he was appalled by the use of asbestos in cigarette filters. That wasn't his job.
>
> His job was to inspect work places and maybe he should have been a champion, maybe he should have been a hero.
>
> When they asked him the question about whether, did you go to the Boston Globe. People didn't do that in the 1950's. They stayed within their jobs and that was to his role to do that.

(Plaintiffs' Closing Argument, R.T., at 2089-90, CCR Exhibit B, Tab 5).

As these excerpts indicate, plaintiffs employed Mr. Comproni's unqualified expert opinions as the anchor for their "state of the art" case. Plaintiffs claimed that Mr. Comproni's testimony proved the state of knowledge in the early 1950s regarding the use of asbestos in cigarette filters. Without establishing any foundation that Mr. Comproni was qualified to give such an opinion, plaintiffs used his statement to demonstrate a level of knowledge which was undocumented by any contemporaneous scientific literature and unsupported by any expert witness at trial.

Plaintiffs offered no witness who could cite to any scientific study associating the use of Asbestos-containing consumer products with disease. According to plaintiffs' own expert, Dr. Nicholson, the state of knowledge at the time regarding the hazards of asbestos related only to intense life-long occupational exposures. (R.T., at 807-09, CCR Exhibit B, Tab 6). Thus, plaintiffs were permitted to employ Mr. Comproni's testimony regarding his alleged state of mind decades ago – a man with no specialized knowledge or training – as the only evidence on this critical issue. Because Mr. Comproni was unqualified to render the opinion which plaintiffs were then able to rely upon before the jury, defendants were unduly prejudiced. As a result, the admission of the Comproni testimony precluded defendants from receiving a fair trial.

B. The Weight Of The Evidence Presented At Trial Was Insufficient To Justify The Jury's Finding That H&V Was Negligent [CCP 657(6)].

1. The Court Must Weigh the Evidence and Must Draw Its Own Conclusions.

When ruling on a motion for new trial premised on a claim of insufficiency of the evidence, the court not only has the right, but an affirmative duty and obligation, to weigh the evidence presented on the issue in question independently. *Tice v. Kaiser Co.* (1951) 102 Cal. App. 2d 44, 46. In weighing and evaluating the evidence, the Court is not bound by factual resolutions made by the jury. *Candido v. Huitt* (1984) 151 Cal. App. 3d 918, 923. The court may grant a new trial even if there is sufficient evidence to sustain the jury's verdict on appeal, so long

as the court determines that the weight of the evidence is against the verdict *Id.*

The Court in evaluating a motion for new trial, must independently weigh the evidence and formulate its own conclusions regarding the credibility of each witness. *People v. Robarge* (1953) 41 Cal. 2d 628, 634. If, after weighing the evidence, the Court is convinced from the entire record of credible evidence that the jury should have reached a different verdict or decision, a new trial should be ordered. Code of Civil Procedure § 657; *Tice,* 102 Cal. App. 2d at 46.

2. Plaintiffs Failed to Show that the Risks of Harmful Health Effects Associated with the Use of an Asbestos-Containing Filter Was Known or Knowable.

As the Court instructed the jury, plaintiffs' negligence claim required a showing that H&V did something which a reasonably prudent person would not do under the circumstances similar to those shown by the evidence. (R.T., at 2221, CCR Exhibit B, Tab 7). Here, plaintiffs were required to demonstrate by a preponderance of evidence that defendants knew or should have known of the harmful health effects associated with an Asbestos-containing filter between 1952 and 1956. Plaintiffs offered no testimony or studies which suggested that medical science believed such a danger existed during this period. Moreover, defendants offered evidence demonstrating that the American Medical Association *praised* the Asbestos-containing filter as the most effective cigarette filter on the market in a 1953 article. The jury apparently ignored the

evidence on this issue and assigned a standard of care incorporating today's knowledge of asbestos to the actions defendants took over 40 years ago. Given plaintiffs' utter lack of "state-of-the-art" evidence and defendants' evidence establishing no such contemporaneous knowledge existed, the weight of the evidence does not support the jury's verdict.

a. Defendants' "State-of-the-Art" Expert Failed To Demonstrate the Requisite Medical Knowledge During the Relevant Period.

To establish what was known during the early and mid-1950s, plaintiffs offered one expert witness, William Nicholson, M.D. Dr. Nicholson testified on direct examination that he was conversant with the major studies associating asbestos with disease and that there were some pre-1956 published studies. (R.T., at 790-91, CCR Exhibit B, Tab 8). On cross-examination, however, Dr. Nicholson revealed that the studies he referenced concerned only life-long extensive occupational exposures to asbestos:

> Q. Let me ask you a couple questions about asbestos and disease. The people who were studying asbestos and disease before 1960 were studying it in the workplace. Isn't that right?
>
> A. Largely so.
>
> Q. And, in fact, what you have described in one of your papers as the landmarks in asbestosis disease all dealt with asbestos exposure in the workplace to people working with either raw asbestos or manufacturing asbestos into other asbestos products?

A. Or using asbestos products certainly in the sixties.

(R.T., 804, CCR Exhibit B, Tab 8). Dr. Nicholson further conceded that, through the late 1960s, asbestos was commonly used in a host of consumer products:

Q. And throughout this entire time [up to 1969] asbestos was being used in building materials?

A. Yes.

Q. And consumer products?

A. Yes.

(R.T., at 808, CCR Exhibit B, Tab 8).

Plaintiffs offered no evidence from which even an inference can be drawn that the pre-1956 medical and epidemiological knowledge demonstrated an association between the use of Asbestos-containing consumer products and disease. In fact, plaintiffs' own expert acknowledged that asbestos was a common ingredient in many different consumer products during this period. The evidence presented at trial simply failed to establish that defendants knew or could have known of dangers inherent in an Asbestos-containing cigarette filter and, as such, plaintiffs did not present sufficient evidence to justify a finding of negligence.

b. Defendants Provided Additional Evidence Conclusively Showing The Lack of Knowledge During the Relevant Years.

In addition to plaintiffs' failure to satisfy their burden of proof on the negligence claim, defendants affirmatively disproved the notion that medical science was aware that the Asbestos-containing cigarette filter posed any potential for harm. Again, plaintiffs' own witness confirmed that the Journal of the American Medical Association ("JAMA") published an article evaluating various cigarette filters in 1953 which described the use of Asbestos-containing filter material. (R.T., at 833, CCR Exhibit B, Tab 9). Dr. Nicholson further confirmed that the 1953 JAMA article made no mention of any potential or theoretical health concerns related to the use of asbestos in cigarette filters. (R.T., at 834, CCR Exhibit B, Tab 9). Given this statement in 1953 by one of the world's leading medical journals, and the complete lack of contemporaneous medical evidence, plaintiffs failed to establish this crucial element of their negligence claim and the Court should grant a new trial.

C. The Inclusion Of Causes Of Action For Fraud Against Hollingsworth & Vose Company Without Having Been Pled And In The Absence Of Any Supporting Evidence Was Prejudicial Error [CCP 657(1) AND CCP 657(7)].

1. Plaintiffs Never Pled a Fraud Claim Against Hollingsworth & Vose Company.

In plaintiffs' First Amended Complaint, the Seventh Cause of Action sets out the only claim for fraud:

> AS AND FOR A FURTHER SEVENTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FRAUD, PLAINTIFF MILTON J. HOROWITZ *COMPLAINS OF DEFENDANT, LORILLARD, INC. AND FORTIETH DOE THROUGH FIFTIETH DOE,* INCLUSIVE, AND EACH OF THEM, AND ALLEGED AS FOLLOWS:. . . .

(First Amended Complaint, at 14, CCR Exhibit C) (emphasis added). Conspicuously, plaintiffs did not assert a cause of action for fraud against Hollingsworth & Vose Company ("H&V"). Moreover, at no time during discovery or during trial did plaintiffs move for leave to amend their First Amended Complaint. *In no way did plaintiffs provide H&V with notice that they intended to proceed against H&V under the fraud claims.* In fact, it was not until all parties had rested, during a discussion of the proposed Special Verdict Form, that plaintiffs made known their intent to pursue fraud claims against H&V. (R.T., at 2071, CCR Exhibit B, Tab 10).

H&V then made a timely objection to its inclusion in the Special Verdict Form questions addressing the fraud claims. The Court nonetheless allowed the claims to go to the jury against H&V:

> MR. BRAKE: . . . There is no fraud claim asserted against Hollingsworth & Vose. The first inkling that I can recall of a fraud claim against Hollingsworth & Vose is the inclusion of the company name in the questions, in plaintiffs propose [sic] special verdict.
>
> . . . This should be dismissed by nonsuit, didn't plead as none (sic), not plead with, not

> only not with particularity, but plead it at all. I wasn't on notice they were proceeding with it.
>
> It shouldn't have to have it submitted to the jury.
>
> * * *
>
> THE COURT: Okay. All right. I will denied (sic) all the motions for nonsuit.

(R.T., at 2071, 2074, CCR Exhibit B, Tab 10).

The complaint in a civil action serves two functions, both fundamental to the preparation and trial of a civil action: (1) it frames and limits the issues; and (2) it apprises the defendant of the basis upon which the plaintiff is seeking recovery. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 211-212. This requirement is particularly stringent with respect to claims grounded in fraud. Fraud claims must be pled with particularity so as to "furnish the defendant with certain definite charges which can be intelligently met." *Id.* at 216 (quoting *Lavine v. Jessup* (1958) 161 Cal. App. 2d 59, 69).

Here, plaintiffs expressly did not plead a fraud claim against H&V Plaintiffs, therefore, failed to provide definite averments against which H&V could defend at trial. Because plaintiffs did not make their intention to pursue the fraud claims known until all parties had rested, H&V had no meaningful opportunity to defend these claims. Including H&V on the Special Verdict Form's fraud questions and allowing the fraud claims to be submitted to the jury without plaintiffs having pled or otherwise argued the claims is a *per se* violation of the rule requiring these

claims be pled – and pled with particularity. H&V was unduly prejudiced and denied a fair trial.

To allow the claim to be tried and submitted in this manner has the effect of rendering the pleading requirements non-existent and depriving H&V of any meaningful opportunity to defend the non-pled claims.

2. Even If Plaintiffs Had Provided Sufficient Notice of Their Intent To Proceed Against H&V for Fraud, They Presented No Evidence Sufficient To Justify the Jury's Verdict against a Component Part Manufacturer.

Even if plaintiffs had asserted their fraud claims against H&V, there was insufficient evidence to justify submitting the claim to the jury. As the Court instructed the jury, a claim of fraud by concealment requires a showing that: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact of the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) the concealment or suppression of the fact caused the plaintiff to sustain damage. (R.T., at 2223, CCR Exhibit B, Tab 11).

It was an undisputed fact at trial that H&V Specialties ("Specialties"), an H&V subsidiary, was a component part manufacturer that created filter media used in Kent cigarettes. Specialties did not manufacture cigarettes, never distributed cigarettes, and never advertised.

Specialties manufactured the filter media into bulk rolls, and shipped the filter media to Lorillard.

Plaintiffs presented no evidence whatsoever that H&V or Specialties were involved in any capacity in the manufacture, distribution, marketing, or, most particularly, advertising of Kent cigarettes. A "fraud" clam cannot be stated under the heading of concealment because Specialties, as the component supplier, had no fiduciary or confidential relations to plaintiff creating a duty to disclose any facts to consumers of Kent cigarettes. *See La Jolla Village HomeOwners' Association, Inc. v. Superior Court of San Diego County* (1989) 212 Cal. App. 3d 1131, 1152 (precluding cause of action for fraud based on concealment as to subcontractor for lack of duty). Because Specialties's involvement was as a supplier to Lorillard, plaintiffs could not and did not present any evidence sufficient to establish that H&V intended to induce action by plaintiffs. Hence, any "concealment" fraud claim should not have been submitted to the jury.

3. The Inclusion of Hollingsworth & Vose Company on the Special Verdict Form's Fraud Questions Resulted In Undue Prejudice and Precluded H&V From Receiving a Fair Trial.

As a component part supplier, Specialties made no representations to the public. specialties had neither input into nor control over any Kent cigarette advertising. Plaintiffs introduced absolutely no evidence to the contrary. Although the fraud claims were not asserted in plaintiffs' First Amended Complaint, and although plaintiffs introduced no supporting evidence, and over H&V's

timely objection, the Court ordered that the Special Verdict Form include H&V on the following questions:

No	Question
8	Did a defendant make a representation as to a past or existing material fact?
9	Was the representation false?
10a	Did the defendant know that the representation was false when it made it?
10b	Did the defendant make the representation recklessly without knowing whether it was true or false?
10c	Did the defendant make the representation without any reasonable grounds for believing it to be true?
11	Did the defendant make the representation with an intent to defraud the plaintiff?
16	Did defendant conceal or suppress a material fact?
17	Did the defendant intentionally conceal or suppress the fact with the intent to defraud the plaintiff?
20	Did defendant's concealment or suppression of the fact cause plaintiff damage?

Although plaintiffs presented absolutely no evidence of any representation made by H&V, the jury answered "Yes" to questions 8, 9, 10b, 10c, and 11. (R.T., at 2268-69, CCR Exhibit B, Tab 12). Although plaintiffs presented no evidence or argument concerning H&V's duty to consumers of Kent cigarettes, a product which H&V had no

role in manufacturing, distributing, marketing, or advertising, the jury answered questions 16, 17, and 20 "Yes" with respect to H&V. (R.T., at 2270, CCR Exhibit B, Tab 12). As the jury's verdict demonstrates, the Court's failure to grant H&V's motion for nonsuit on the unsupported and unpled fraud claims resulted in undue prejudice and precluded H&V from receiving a fair trial.

Moreover, having summarily determined that H&V was liable for "fraud," the jury went on to find, by clear and convincing evidence, that H&V was guilty of "malice, oppression, or fraud," and awarded plaintiffs $140,000 in punitive damages against H&V. The inclusion of the fraud questions motivated the punitive damage verdict. Having determined the existence of "fraud" (despite the absence of evidence), the jury went straight to a finding sufficient to justify an award of punitive damages. Had H&V been removed from the Special Verdict Form's fraud questions, as the law and evidence required, it is likely that the jury would not have found malice, oppression, or fraud.

III.

CONCLUSION

Based on the foregoing arguments and Lorillard's Memorandum of Points and Authorities in Support of Its Motion for New Trial, defendant Hollingsworth & Vose Company respectfully requests this Court to grant its motion and order a new trial.

Dated: October 20, 1995

PREUSS WALKER & SHANAGHER

/s/ Cynthia C. Roenisch
Cynthia C. Roenisch

Attorneys for Defendant
Hollingsworth & Vose
Company

APPENDIX B

DONALD F. ZIMMER, JR. (State Bar No. 112279)
CYNTHIA C. ROENISCH (State Bar No. 151908)
PREUSS WALKER & SHANAGHER
595 Market Street, 16th Floor
San Francisco, California 94105-2825
Telephone: (415) 978-2600
Facsimile: (415) 978-2613

ANDREW J. McELANEY, JR.
STEPHEN J. BRAKE
DANIEL R. HARRIS
NUTTER, McCLENNEN & FISH
One International Place
Boston, Massachusetts 02110-2699
Telephone: (617) 439-2000

Attorneys for Defendant
HOLLINGSWORTH & VOSE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ Plaintiffs, v.	No. 965245 **REPLY OF HOLLINGSWORTH & VOSE COMPANY TO PLAINTIFFS' OPPOSITION TO HOLLINGSWORTH & VOSE'S MOTION FOR A NEW TRIAL**

RAYBESTOS -MANHATTAN, INC., et al. Defendants.	Date:	November 6, 1995
	Time:	2:00 p.m.
	Dept.:	1 (TBA)
	Judge:	Winton McKibbon (X-5)

(Filed Nov. 3, 1995)

In their Opposition, plaintiffs maintain that Hollingsworth & Vose ("H&V") should not be granted a new trial because: (1) there was sufficient "foundation" for the admission in evidence of Elise Comproni's expert opinion about the knowledge of asbestos-related disease in the 1950's; (2) that plaintiffs were entitled to pursue a fraud claim against H&V even though they failed to plead any such claim; and (3) even if submission of the fraud claim to the jury was in error, it was "harmless error" as there was no prejudice to H&V. H&V briefly replies to each of these contentions.

1. **Comproni's "Testimony" Prejudiced H&V's Right To A Fair Trial.**

Elise Comproni – who in October 1952 was a first year employee at the Massachusetts Department of Industrial Hygiene – gave an opinion about what was supposedly "knowable" in 1952 about the hazards of asbestos with no demonstrated basis of expertise. Comproni's actual testimony makes clear he had no competency to give this opinion. According to Comproni, lung cancer was a "known" effect from asbestos exposure. The source of his information was supposedly the Library of the Massachusetts Agency at which he worked. In fact, the record is clear that Comproni could not specifically

outline any specific basis for his opinion. Deposition of Elise Comproni ("Comproni Dep.") at 56:1-19; 57:4-10; 58:1-16; and 61-63, attached as Exhibit A to the Declaration of Cynthia C. Roenisch ("Roenisch Decl."). The fact is that other than a general reference to his superiors and the library, Comproni knew nothing of substance about the question of asbestos and cancer. Comproni Dep. at 63:12-22, Roenisch Decl., Exhibit A.

By virtue of his having visited the H&V Specialties plant in 1952, Mr. Comproni makes a convenient trojan horse for an improper opinion that he is without the knowledge to render.

2. The Submission of Plaintiffs' "Fraud" Claim To The Jury Requires A New Trial.

Plaintiffs concede they pled no fraud claim against H&V, but claim H&V was nonetheless "on notice" of the claim essentially because it was supposedly referred to in opening statements. Plaintiffs then argue that this "variance" between the pleading and proof is not to be deemed material since there was no prejudice to H&V.

Plaintiffs did nothing to place H&V on notice it specifically faced a fraud claim. On the contrary, *plaintiffs never stated, by pleading or otherwise, that they were seeking to hold H&V liable for Lorillard's advertisements.* Counsel did not state in her opening statement that she intended to try this fraud claim against H&V. Plaintiffs offer no record citation on this point because there is none. Instead, plaintiffs' counsel made references in opening statement to "the defendants" "advertisements" and in "their TV

advertising" presumably referring to Lorillard's advertisements for Kent cigarettes. Reporter's Transcript ("R.T.") at 358, Roenisch Decl., Exhibit B. But H&V had no advertisements – and did not advertise on television. The elliptical references during opening statement, placing Lorillard and H&V together, cannot constitute putting a defendant on notice that the fraud claim is part of the case.

Indeed, the case law under CCP § 469 requires that for amendment to be allowed at trial, the unpled claim must be "thoroughly explored during trial and the theory of the trial well known to court and counsel." *Brickman v. Parliament Escrow Corporation,* 190 Cal. App. 3d 1051 (1987) (citing *Duncan v. Sunset Agricultural Minerals,* 273 Cal. App. 2d 489 (1987)). No fraud claim seeking to hold H&V liable for Lorillard's advertising was "well known" or "thoroughly explored" during trial. The notion the fraud claim was understood by H&V to be part of the case is demonstrably absurd.

Instead, plaintiffs would construe the rule allowing amendment of a pleading to conform to the evidence, into a wholesale abrogation of the rule that fraud claims must be plead [sic] with specificity. The fact is that fraud must not only be plead [sic] – but as the Supreme Court of California has said – it must be *"specifically alleged."* (Emphasis added) *Lavine v. Jessup,* 161 Cal. App. 2d 59 (1958).

Plaintiffs scrupulously avoided "specifically alleging" the fraud claim against H&V depriving H&V of its ability to defend the case. Plaintiffs' ultimate contention was that H&V committed fraud through Lorillard's

advertisements – and that H&V should be responsible for these advertisements as a "joint venturer." By avoiding pleading the claim, however, and raising this joint venturer argument for the first time upon motion for non-suit, plaintiff was able to proceed to trial on the claim while using a wholly incorrect legal standard. H&V, only learning of this joint venturer theory after the close of the evidence, did not have the time or the ability to defend this claim.

Plaintiffs then claimed in their closing argument that liability should be imposed on H&V, as well as Lorillard because "these two companies were in this thing together." R.T. at 2087, Roenisch Decl., Exhibit B. Now, in their brief on this motion, plaintiffs make the same "joint venturer" claim. (Pl. Opp. at 13.)

Under California law a joint venture exists when the parties have *joint control* of the enterprise and of each other's actions – it is not sufficient that they merely have plans in common. *Christianson v. Superior Court*, 54 Cal. 3d 868 (1991). Each venturer must be able to be considered the agent of the other in the business transaction. *Cahill Bros., Inc. v. Clementina Co.*, 208 Cal. App. 2d 367 (1962).[1]

Here, the plaintiffs cannot seriously contend that H&V had *any* control – much less *joint* control – over Lorillard's sale of Kent cigarettes. Plaintiff could not

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[1] In determining whether a joint venture exists, California courts also look to the expression of the parties in the written agreement. *Gurewitz v. Kindir*, 96 Cal. App. 3d 460 (1979). Here, as was pointed out upon motion for non-suit, the agreement specifically states it is not intended to create a joint venture. Pl. Ex. 115, R.T. at 2072, Roenisch Decl., Exhibit B.

prove a joint enterprise claim under California law – so they did not plead the claim. Then, at trial, rather than meet the standard that the law sets for joint enterprise liability in fraud (i.e. joint control), plaintiffs' counsel ignored the law, and simply instructed the jury to impose joint liability upon the glib assertion that H&V and Lorillard "were in it together." Moreover, plaintiffs' counsel argued this for *all* claims in the case, not only fraud and punitive damages: "[a]ll my remarks go as well to H&V because they were in this together." R.T. at 2087, Roenisch Decl., Exhibit B.

This should not have occurred. The joint enterprise and fraud claim should have been pled with specificity. BAJI has a specific instruction, 13.40, requiring a finding that each party has *"an equal right of control, that is, to direct and govern the conduct of the other as to the common undertaking.*[2] (Emphasis added) Plaintiffs should have been required to meet this standard. Instead, they instructed the jury that joint liability may be imposed because the defendants "are in this together" – a demonstrably incorrect statement of law.

In summary, H&V was prejudiced for three reasons. First, H&V did not know of, and did not defend the "joint enterprise" theory of fraud liability. Second, as a consequence of this lack of notice, plaintiff was able to proceed

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[2] In making the non-suit motion, counsel to H&V pointed out to the Court the correct "joint control" standard for establishing a joint venture – and asserted that *as a matter of law* plaintiff could not meet the standard. *See* R.T. at 2071-73, Roenisch Decl., Exhibit B.

on a joint enterprise theory – without regard to the correct legal standard. Third, the jury having found H&V to have acted fraudulently on this incorrect theory of law, proceeded to award damages, including punitive damages against H&V.

Dated: November 3, 1995

PREUSS WALKER & SHANAGHER

/s/ Cynthia C. Roenisch
CYNTHIA C. ROENISCH

Attorneys for Defendant
HOLLINGSWORTH
& VOSE COMPANY